No. 374

RECEIVED
SEP 6 - 1955
CLERK
SUPREME COURT, U. S.

In the

Supreme Court of the United States

October Term, 1955

TOMMY LEE WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND MOTION FOR LEAVE TO FILE

W. J. DURHAM and
J. L. TURNER, JR.,
Excelsior Life Building,
2600 Flora Street,
Dallas, Texas,
Attorneys for Petitioner.

U. SIMPSON TATE,
KENNETH F. HOLBERT,
Of Counsel.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - RI-6711

INDEX

	Page
Court of Criminal Appeals of Texas	3
Opinion Below	4
Jurisdiction	4
Federal Questions Presented for Review	5-7
Constitutional Provisions and Statutes Relied Upon	8
Statement of Facts Material to a Consideration of the Federal Questions Presented:	
Section A	8-19
Section B	19-21
Section C	21-23
The Stage in the Proceedings in the Courts Below at Which, and the Manner in Which, the Federal Questions Here Presented Were Raised	23-24
Specification of Errors	24-25
Reasons for Granting Petition for Writ of Certiorari Presented Under Errors One and Two	25-32
Reasons for Granting Petition for Writ of Certiorari Presented Under Errors Three and Four	32-45
Reasons for Granting Petition for Writ of Certiorari Presented Under Error No. Five	45-48
Conclusion	49
Affidavit of Petitioner	49-50
Certificate	50
Proof of Service	51
Appendix A, B, C, D, E, F, G	53-88

Page

Abie State Bank v. Weaver, 51 S. Ct. 252 (282 U. S. 765) 43

Agnello v. United States, 46 S. Ct. 4 (269 U. S. 20) 20

Broad River Power Co., et al. v. State of South Carolina ex rel. Daniel, 50 S. Ct. 401 (281 U. S. 537) 45

Cagle v. State, 180 S. W. 2d 928 35-37

Cassell v. State of Texas, 70 S. Ct. 629 (339 U. S. 282) 8, 15, 16, 31, 32

Creswill v. Grand Lodge Knights of Pythias, 32 S. Ct. 822 (225 U. S. 246) 43

Demorest, et al. v. City Bank Farmers Trust Co., et al., Dyett v. Title Guarantee & Trust Co., et al., 64 S. Ct. 384 (321 U. S. 36) 44

Fay v. People of New York, 67 S. Ct. 1613 (332 U. S. 261) 25

Garner, et al. v. United States, 174 F. 2d 499 40

Harris v. United States, 67 S. Ct. 1098 (331 U. S. 145) 38

Hernandez v. State of Texas, 74 S. Ct. 667 (347 U. S. 475) 25, 30

Hill v. State of Texas, 62 S. Ct. 1159 (316 U. S. 400) 17

Nardone, et al. v. United States, 60 S. Ct. 266 (308 U. S. 338) 21

Norris v. State of Alabama, 55 S. Ct. 579 (294 U. S. 587) 19, 35

Nueslein v. District of Columbia, 115 F. 2d 690 42

Patton v. State of Miss., 68 S. Ct. 184 (332 U. S. 463) 25

Pierre v. Louisiana, 59 S. Ct. 536 (306 U. S. 354) 25

Page

Shelley v. Kraemer, 68 S. Ct. 836 (334 U. S. 1) 46

Smith v. State of Texas, 61 S. Ct. 164 (311 U. S. 128) 18

Stefanelli, et al. v. Minard, et al., 72 S. Ct. 118 (342 U. S. 117) 22, 46, 47

Thomas Quinn, Petitioner v. United States, 75 S. Ct. 668 48

Vinson v. State, 137 S. W. 2d 1048 39

Wolf v. People of the State of Colorado, 69 S. Ct. 1359 (338 U. S. 25) 22, 47

Young v. Ragen, 69 S. Ct. 1073 (337 U. S. 235) 35

Texas Statutes

Article 727a, Code of Criminal Procedure of Texas 19, 38, 43

Articles 212, 213, 325, Code of Criminal Procedure of Texas 33

Articles 73, 98, 101, 215, 244, Code of Criminal Procedure of Texas 33, 34

Articles 156, 487, 666-30, 803, Texas Penal Code 33, 34

Federal Statutes

Title 28, U. S. C., Section 1257(3) 5

Title 28, U. S. C., Section 2106 5

Title 28, U. S. C., Section 237(b) (Judicial Code) 5

Title 28, U. S. C., Section 344(b) 5

Rule 5 of Title 18, U. S. C., Entitled: "Federal Rules of Criminal Procedure" 39

Federal Constitution

Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States 5-7

No.....

In the

Supreme Court of the United States

October Term, 1955

TOMMY LEE WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes the petitioner and respectfully moves this Court for leave to file the annexed Petition for Writ of Certiorari under Title 28 U. S. C., Section 1257(3), and Section 2106 of Revised Title 28 U. S. C., also Section 237(b) of the Judicial Code as amended and 28 U. S. C., Section 344(b) directed to the Court of Criminal Appeals of the State of Texas, to review an order and judgment of that court entered on February 9, 1955, and more particularly described in the petition, and for such other and further relief as may be just and proper.

W. J. DURHAM and
J. L. TURNER, JR.,
Attorneys for Petitioner.

By.....

No.....

In the

Supreme Court of the United States

October Term, 1955

TOMMY LEE WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner, Tommy Lee Walker, respectfully prays that a Writ of Certiorari issue to review a final order and decree of the Court of Criminal Appeals of Texas which affirmed a final judgment of conviction rendered by the District Court of Dallas County, Texas, convicting this petitioner for the offense of murder and fixing and assessing his punishment at death.

COURT OF CRIMINAL APPEALS OF TEXAS

The Court of Criminal Appeals of Texas is the highest court and the court of last resort in criminal matters in Texas under the Constitution and laws of the State of Texas.

Your petitioner is a citizen of the United States and a person of African descent and a member of the Negro race; the deceased was a member of the Caucasian race.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported in ..... S. W. 2d at page ..... (Not yet reported.) (See Opinions, Appendix C and D.)

JURISDICTION

The judgment of conviction in the District Court of Dallas County, Texas, was entered on the 29th day of March, 1954. (Appendix G.)

The opinion of the Court of Criminal Appeals of Texas affirming the trial court's judgment was entered on the 9th day of February, 1955. (Appendix C.)

The opinion of the Court of Criminal Appeals of Texas overruling petitioner's first motion for rehearing was entered on the 1st day of June, 1955. (Appendix D.)

Petitioner's second motion for rehearing was overruled by the Court of Criminal Appeals of Texas on the 22nd day of June, 1955 (R., p. 1407, V. 2), thereby said judgment of conviction against this petitioner became final insofar as the courts of the State of Texas are concerned.

The Court of Criminal Appeals of Texas entered its order to stay the issuance of mandate and execution of sentence dated June 25, 1955. (Appendix F.)

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3), and Section 2106 of Revised Title 28 U. S. C., also Section 237(b) of the Judicial Code as amended and 28 U. S. C., Section 344(b), petitioner having asserted in the courts below rights, privileges, and immunities conferred by the Constitution of the United States.

FEDERAL QUESTIONS PRESENTED FOR REVIEW

(a) Whether the indictment upon which petitioner was tried and his conviction thereupon are unlawful and void where the undisputed evidence shows that the State of Texas, through its judiciary (Criminal District Court of Dallas County, Texas) discriminated against the petitioner and members of the Negro race on account of race and color by intentionally, purposefully, and systematically refusing to appoint any member of the Negro race on the Grand Jury Commission which selected the Grand Jury that returned the indictment against petitioner, because the Judge knew no Negro citizens whom he thought eligible to serve on the Grand Jury Commission and appointed only white citizens on such Commission with whom he was intimately acquainted, and whether such exclusion of Negroes from the Grand Jury Commission was racial discrimination in violation of rights, privileges, and immunities guaranteed under the Fourteenth Amendment to the Constitution of the United States.

(b) Whether the action of the Grand Jury Commissioners, where their acquaintance with Negro citizens was lim-

ited, that they knew no Negro citizens whom they regarded as qualified for service on the Grand Jury Panel which returned the indictment against the petitioner, and therefore, purposefully, intentionally, and systematically selected only *one* (1) Negro citizen to serve on the Grand Jury, amounted to a discrimination against petitioner because of his race and color in violation of rights, privileges, and immunities guaranteed under the Fourteenth Amendment of the Constitution of the United States.

(c) Whether the admission of the purported confessions [R., pp. 1269-1270 (640-641), V. 2], when the undisputed testimony [R., pp. 812-822, 838-841 (189-199, 215-218), 1114 (487), V. 2] shows such testimony was obtained in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States, was a violation of rights, privileges, and immunities guaranteed under the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States and federal laws, and especially where the State of Texas under express authority passed Article 727a of the Code of Criminal Procedure of Texas prohibiting the introduction of all testimony in the trial in a state court obtained in violation of federal laws and provisions of the Constitution of the United States.

(d) Whether the provisions of federal laws and the provisions of the Constitution of the United States are controlling where the State of Texas has carefully passed legislation prohibiting the admission of evidence in a state court obtained in violation of federal laws and provisions

of the Federal Constitution, and whether the admission of testimony so obtained is in violation of rights, privileges, and immunities guaranteed under the Fourth and Fourteenth Amendments of the Constitution of the United States.

(e) Whether the Supreme Court of the United States will determine for itself whether there has been a violation of petitioner's rights, privileges, and immunities guaranteed to him by the Fourth and Fourteenth Amendments to the Constitution of the United States, where the State of Texas has carefully passed legislation making evidence inadmissible in the trial in a state court where the evidence has been obtained by state officers in violation of the Federal Constitution and laws and such evidence is admitted in a court of the State of Texas against petitioner.

(f) Whether the action of the trial court in admitting evidence shown by the undisputed testimony to have been obtained by unlawfully entering the home of the petitioner in violation of rights, privileges, and immunities guaranteed under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and the action of the Court of Criminal Appeals of Texas in affirming said judgment upon such testimony is illegal sanction by the State of Texas through its judiciary of an arbitrary illegal intrusion of state police officers into the petitioner's home in violation of rights, privileges, and immunities guaranteed under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

The constitutional provisions and statutes involved in this case are lengthy and are set out verbatim in Appendix A attached to this Petition.

STATEMENT OF FACTS MATERIAL TO A CONSIDERATION OF THE FEDERAL QUESTIONS PRESENTED

A.

The judgment of the Court below was based upon the erroneous interpretation of this Court's opinion in the case of *Cassell v. State of Texas, 70 S. Ct. 629 (339 U. S. 282)*. The petitioner filed a motion in the trial court to quash the indictment upon the premise that racial discrimination prohibited by the Federal Constitution had been practiced by the District Judge and the Grand Jury Commissioners by exclusion and limitation of Negroes on the Commission and Grand Jury on account of race and color [R., pp. 14-21 (10-17), V. 1].

The Court after hearing evidence in support of petitioner's motion, overruled the motion to quash the indictment [R., p. 574 (143), V. 1]. The petitioner offered testimony in support of his motion to quash the indictment.

J. W. Rice [R., pp. 436-444 (5-13), V. 1] testified that since the year 1940 at least ten thousand (10,000) Negroes annually above twenty-one (21) years of age paid their poll taxes in Dallas County; that they owned real estate;

that Negro citizens lived in every part of the county and not more than one per cent per thousand could not read and write; that he was an American Negro citizen.

Rev. E. C. Estell [R., pp. 445-451 (14-20), V. 1] testified that he was an American Negro; that there were four thousand (4,000) members in the church which he pastored, and at least eleven hundred (1100) male citizens over twenty-one (21) years of age owned real estate and were qualified to vote; that between eighty-five per cent and ninety per cent of such citizens could read and write the English language and lived in various sections of the county; that they had no suits pending against them for which the intervention of a jury was required.

The witness C. F. Starks testified [R., pp. 451-466 (20-35), V. 1] that he had lived in the County of Dallas for sixty-one (61) years, he owned real estate for forty (40) years, and was an American Negro citizen; that he had been dealing with Negroes socially, religiously, and in a business manner for a period of forty (40) years; that he had dealt with male Negro citizens above twenty-one (21) years of age during such period of time numbering between twenty-five hundred and three thousand persons, and that one hundred percent of those with whom he had dealt could read and write the English language, had no suits pending against them for which the intervention of a jury was required, had never been convicted of a felony, and that he had dealt with four or five thousand male Negroes over twenty-one (21) years of age through organizations and that the greater percentage of that num-

ber could read and write the English language, were eligible voters and owned real estate; that he was a college graduate, was never called to serve on the Grand Jury Commission; that he had in the past been called by Jury Commissioners on numerous occasions to name one Negro citizen to serve on the Grand Jury and that he recommended one and only one; that when he contacted one who could not serve, he would then contact another until he found one who could serve. He was requested by the Commissioners on various occasions to name only *one* Negro at the time.

The witness Rev. Cyphers [R., pp. 467-472 (36-42), V. 1] testified that he was an American Negro; that through his association with various organizations in Dallas County, Texas, he had contacted between twenty-five thousand and thirty thousand Negroes; that about ninety-eight (98%) per cent of such Negroes whom he knew could read and write the English language and a large percentage owned real estate and were qualified to vote and lived in various sections of the city.

The witness T. W. Pratt [R., pp. 474-477 (43-46), V. 1] testified that he served on the Grand Jury and that only one Negro served at the time he served; that many thousand of male Negro citizens could read and write the English language, owned real estate in various sections of the County, and were eligible to vote.

The witness Rucker [R., pp. 478-485 (47-54), V. 1] testified substantially that he knew at least five thousand

(5,000) male Negro citizens who lived in Dallas County, Texas and had no suits pending against them for which the intervention of a jury was required, they were eligible to vote, owned real estate, and could read and write the English language; that he had served on the Grand Jury and that only one Negro citizen served on the Grand Jury with him.

Many other witnesses testified substantially to the same testimony as the witnesses Cyphers, Pratt, Starks, Estell, and Rice.

The witness Charles Hansen, one of the commissioners who selected the members of the Grand Jury which returned the indictment against the petitioner, testified that he was a member of the Grand Jury Commission which impaneled the Grand Jury in this case [R., pp. 405-512 (70-81), V. 1], that all of the names of the citizens on the list of grand jurors were white except one. The same witness testified that Clarence Jackson who served as a member of the Grand Jury which indicted the appellant had been recommended to him; that Jackson was selected as a member of the Panel; that he told the other members of the Commission that Jackson was a Negro and they discussed his racial identity; that the racial identity of no other person whose name appeared on the list was discussed except Jackson; that his acquaintance with Negroes was limited and he got Jackson's name through a friend and acquaintance whom he had known through his lodge and business associates. That the Commissioners wanted to put a Negro on the Grand Jury. They therefore put Jackson

whom he knew through a friend, on the Panel. All other persons selected by him for the Grand Jury were from his intimate associates who were all white.

The witness Spencer [R., pp. 512-522 (81-91), V. 1] who was a member of the Grand Jury Commission and aided in the selection of the Grand Jury testified that there was only one Negro on the list of prospective jurors, and that he understood Jackson was a Negro; that one of the sixteen (16) selected was a Negro and the only discussion concerning the other persons whose names were on the list had by the Commissioners was their qualification; their racial identity was not discussed; that he did not happen to know any Negro whom he thought was qualified and for that reason he did not recommend any; that the qualification was not all he considered in selecting the grand jurors, that aside from not knowing any Negroes qualified, he selected men whom he thought could afford financially to give three (3) months time and he did not select any man whom he thought could not give three (3) months time; that he selected men whom he thought were able financially to make the sacrifice; that he limited his selection of five men on the grand jury panel to men whom he was intimately acquainted with; that these men were all white men and were men whom he felt were financially able to serve.

A former district judge of Dallas County, Texas, Judge Robert A. Hall, called by the State, testified [R., pp. 534-544 (104-113), V. 1] that during the time he was judge he appointed men on the Grand Jury Commission whom

he knew personally, more or less intimately; that he appointed people on the Grand Jury Commission with whom he was intimately acquainted; that the Grand Jury impaneled for the month of July, 1950 had two (2) Negroes on the list and that Grand Jury was the first Grand Jury impaneled after the reversal of the *Cassell* case by the Supreme Court of the United States on the 24th day of April, 1950; that the only Grand Jury, except the July, 1950 Grand Jury, where more than one Negro served was a special Grand Jury impaneled to investigate the bombing of Negroes' homes in Dallas County, Texas; that he never appointed any Negro citizens to the Grand Jury Commission; that he limited his appointment of the members of the Grand Jury Commission to citizens whom he knew and with whom he was intimately acquainted; that he did know some Negro citizens who possibly would have been qualified, but his acquaintance with Negroes was so limited that he did not know whether those he knew would pick good men for the Grand Jury.

The State called Judge Henry King, a present district judge of the Criminal Court of Dallas County, Texas, and he testified [R., pp. 545-556 (114-125), V. 1] that the bombing Grand Jury had two (2) Negroes on it and was impaneled primarily for the purpose of looking into the bombing of Negroes' homes; that he appointed only citizens to the Grand Jury Commission whom he knew personally and that he had made it a point to investigate and know the situation behind the person whom he appointed, and he tried to get men whom just their names would indicate

no question of fraud; that he had been connected with the Criminal District Court of Dallas County, Texas as judge since the year 1926; that his selection of members to the Commission during such period of time was limited to men whom he knew personally; that he knew Negro lawyers and he knew some other Negroes who possibly qualified for the Grand Jury Commission, but he did not know them well enough to appoint them as Commissioners; that he limited his appointment to white citizens on the Grand Jury Commission because of his limited or non-acquaintance with Negroes and for the other reasons stated above.

Judge Wright, a witness called by the State and who is a present district judge, testified [R., pp. 557-566 (126-135), V. 1] that he selected the members of the Grand Jury Panel which returned the indictment in this case; that he appointed all white citizens on the Grand Jury Commission and that he limited his appointment to people whom he knew personally; that he knew only one Negro who was one of petitioner's attorneys whom he thought was qualified and possibly some other Negro attorney to serve as members of the Grand Jury; that he knew the racial identity of each member of the Commission before he appointed him; that he ran down the names of citizens on record before making the appointment of the Commissioners, but before running down the names on record he did not know a Negro who was qualified and he therefore appointed all white citizens; that he never thought of a Negro on the Grand Jury Commission.

Petitioner introduced the list of grand jurors who had served on the Grand Jury in Dallas County, Texas from the year 1940 up to and including the selection of the Grand Jury which returned the indictment in this case [R., pp. 591-620 (159-160), V. 1]. The Grand Jury list from 1940 to the date of the trial shows that on some Grand Juries no Negroes were selected and on Grand Juries where a Negro was permitted to serve, only *one* (1) Negro was permitted to serve, except on the first Grand Jury after the *Cassell* case was reversed and on one Grand Jury when the homes of Negro citizens were being bombed in Dallas; a special Grand Jury was selected to inquire into the bombing of such homes.

Concerning the motion to quash the indictment for racial discrimination, the Court of Criminal Appeals of Texas held (Original Opinion, R., pp. 1316-1324, V. 2):

> "Commissioner Spencer testified that he was told by a fellow commissioner that Clarence Jackson was a member of the colored race and that his five selections for the grand jury were intimate acquaintances of his whom he knew to be so situated in business that they might spare three months to serve.
>
> "C. F. Starks, a member of the colored race, testified that he had served on the grand jury about ten years ago and that frequently since that time the Dallas County jury commissioners had called upon him for advice in the selection of members of the colored race for grand jury service. It would seem to us rather, that the commissioners were attempting to comply with the mandate of the Supreme Court of the

United States in Cassell v. Texas, 339 U. S. 282, wherein the Court said:

> " 'Their responsibility was to learn whether there were persons among the Negroes they did not know who were qualified and available for service'."

The Court of Criminal Appeals of Texas in the opinion on petitioner's motion for rehearing on the question of racial discrimination held:

> "It must be remembered that the guarantee of the Fourteenth Amendment against discrimination in the organization of a grand jury is not limited or restricted to members of the different races but extends to and includes all classes and groups which, by reason of some special condition or fact situation, are established in the particular county or community. *Hernandez v. Texas, 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667.*
>
> "It follows, therefore, that in the drawing and selection of a grand jury in this state all races, nationalities, and established classes are entitled to the same treatment and consideration in order that discrimination not be practiced against the members of any particular group or as between the several classes which are entitled to the same protection against discrimination.
>
> "Under the facts here presented, we are unable to arrive at the conclusion that members of the Negro race were discriminated against because of their race in the organization of the instant grand jury."

The Court of Criminal Appeals of Texas erroneously interpreted the opinion of this Honorable Court in *Cassell v. State of Texas, 70 S. Ct. 629 (339 U. S. 282).*

The Court of Criminal Appeals in affirming the judgment of conviction in the trial court held, that the trial court did not err in overruling petitioner's motion to quash the indictment because of racial discrimination in its formation, notwithstanding the fact that racial discrimination was practiced by the Grand Jury Commissioners by selecting only white citizens with whom they were intimately acquainted as members of the Grand Jury and excluding all persons of African descent and Negro blood from serving as members of the Grand Jury; such holding of the Court of Criminal Appeals was an erroneous holding and interpretation of the opinion of this Court in the case of *Hill v. State of Texas, 62 S. Ct. 1159 (316 U. S. 400)*.

The Court of Criminal Appeals of Texas by the affirmance of the judgment of conviction of the trial court in overruling petitioner's motion to quash the indictment because of racial discrimination held, that the State of Texas through its administrative officers may exclude all members of the Negro race from service on the Grand Jury which returned the indictment against the petitioner whom they did not know, or because of their limited acquaintance with Negroes, and select members of the Grand Jury from their personal acquaintances who were all white citizens, and that such racial discrimination was not a violation of rights, privileges, and immunities guaranteed petitioner under the Constitution of the United States. Such holding of the Court of Criminal Appeals in this case was upon an erroneous interpretation of the opinion

of this Court in the case of *Smith v. State of Texas, 61 S. Ct. 164 (311 U. S. 128).*

A federal question, therefore, having been specially set up and claimed in the state court, it is the province and the duty of this Court to inquire not merely whether such federal right was denied in express terms by the administrative officers of the State of Texas, but whether such federal right has been denied in substance and effect even though it requires an examination of the evidence in this case.

The Court of Criminal Appeals in this case by the affirmance of the trial court's judgment which overruled petitioner's motion to quash the indictment for racial discrimination practiced by the State of Texas through its judiciary acting through the District Judge of Dallas County, Texas held, that the State of Texas could discriminate against the petitioner and members of the Negro race on account of race and color by excluding all qualified members of the Negro race from serving on the Grand Jury Commission and include and appoint only white citizens known to the District Judge on such Commission; and that such racial discrimination was not in violation of rights, privileges, and immunities secured and guaranteed to the petitioner under the Constitution of the United States; such holding of the Court of Criminal Appeals of Texas is an errroneous interpretation of petitioner's rights as guaranteed under the Constitution of the United States and is an erroneous interpretation of this Court's opinion in numerous cases that a state may not through its judiciary

practice racial discrimination through its courts, as held by this Court in *Norris v. State of Alabama, 55 S. Ct. 579 (294 U. S. 587).*

The testimony is without dispute that all Negro citizens were excluded from the Grand Jury Commission by the district judge, and the Grand Jury Commissioners who selected the grand jurors limited Negro citizens to one and only one (1) when they were permitted to serve intentionally, purposefully, and systematically on account of race and color.

A substantial federal question having been raised and claimed in the state court and there denied by the court of last resort in criminal matters in Texas, this Court has jurisdiction to decide and determine for itself whether petitioner's rights have been violated.

B.

The trial court by admitting the purported confessions in evidence and the action of the Court of Criminal Appeals in affirming such judgment of conviction denied to petitioner a right guaranteed to him under the Fourth and Fourteenth Amendments to the United States Constitution prohibiting the State of Texas from introducing involuntary confessions as evidence against him, such right being further secured by the procedural laws of the State of Texas against the introduction of evidence against the petitioner obtained in violation of the provisions of the Constitution of the United States and federal laws. (Article 727a, Texas Code of Criminal Procedure.)

The Court of Criminal Appeals of Texas in this case held that the State of Texas, without violating the rights guaranteed under the Fourth and Fourteenth Amendments to the Constitution of the United States against unlawful arrest and unlawful detention, and the use of involuntary confessions, could enter the home of the petitioner without warrant for his arrest, and arrest him and imprison him without any complaint being filed against him for any offense, and hold him in jail from Friday evening, January 29, 1954, until the following Tuesday, February 2, 1954, without filing any complaint, and during such period of time obtain from him involuntary purported confessions of a crime and introduce such purported confessions against him upon a trial of the case for an offense concerning which the purported confessions were made. Such holding of the Court of Criminal Appeals of Texas is an erroneous construction placed upon petitioner's right guaranteed to him under the Constitution of the United States against the introduction of testimony obtained in violation of rights, privileges, and immunities guaranteed by the United States Constitution as held by this Court in the case of *Agnello v. United States, 46 S. Ct. 4 (269 U. S. 20), at page 7.*

In the *Agnello* case, this Court held that evidence obtained through methods forbidden by the Federal Constitution may not be introduced indirectly against the petitioner, therefore, the affirmance of the judgment of the Court of Criminal Appeals was upon an erroneous interpretation and contrary to the interpretation of this Court

in the opinion in *Nardone, et al. v. United States, 60 S. Ct. 266 (308 U. S. 338), at page 267*, in which this Court held contrary to the holding of the Court of Criminal Appeals of Texas:

> "To forbid the direct use of methods thus characterized but to put *no curb on their full indirect use would only invite the very methods deemed 'inconsistent with* ethical standards and destructive of personal liberty'."

C.

The admission of the purported confessions against the petitioner as evidence by the trial court and the affirmance of the judgment of conviction by the Court of Criminal Appeals of Texas upon such testimony is an illegal sanction by the State of Texas through its courts of police officers arbitrarily intruding themselves into the petitioner's home and unlawfully arresting and imprisoning him in violation of rights, privileges, and immunities guaranteed to petitioner under the Fourth Amendment to the Constitution of the United States against such illegal action by the State.

The Court of Criminal Appeals in this case held, that the police officers of the State of Texas may legally and arbitrarily intrude themselves into the home of the petitioner and arrest him without warrant, and hold him without any complaint or charge being filed against him, obtain purported confessions from him while his right of security of person was being violated, and use such evidence obtained as a result of the unlawful and arbitrary intrusion of

police officers into the home of the petitioner and his unlawful arrest and detention, and that the courts of Texas could lawfully condone and sanction such unlawful and arbitrary intrusion of police officers into the home of the petitioner, by resting the judgment of the courts upon testimony obtained as the result of such unlawful acts of the police officers of the State of Texas.

Such holding of the Court of Criminal Appeals upon which it rested its judgment is based upon an erroneous interpretation of the rights of the petitioner to personal security against arbitrary intrusion of police officers into his home in violation of his right of security of person as interpreted and held in the opinion of this Court in *Stefanelli, et al. v. Minard, et al., 72 S. Ct. 118 (342 U. S. 117) at pages 119 and 120.*

The affirmance of the judgment of the trial court by the Court of Criminal Appeals of Texas is an erroneous interpretation of the rights of the petitioner against unlawful intrusion of police officers into his home, in violation of his rights guaranteed under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States interpreted and declared by this Court in the opinion of *Wolf v. People of the State of Colorado, 69 S. Ct. 1359 (338 U. S. 25), at page 1361*, where this Court held:

> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Apart from the need to correct the fatal errors herein pointed out and to correct so great an injustice in this capital case, it is essentially important that this Court grant this Writ of Certiorari so that the holdings in the cases cited above in this petition will not hereafter be misinterpreted.

THE STAGE IN THE PROCEEDINGS IN THE COURTS BELOW AT WHICH, AND THE MANNER IN WHICH, THE FEDERAL QUESTIONS HERE PRESENTED WERE RAISED

The questions here presented were raised first in the trial court by petitioner's motion to quash the indictment because of illegal racial discrimination before pleading to the indictment. [R., pp. 14-21 (10-17), V. 1.] The trial court overruled said motion [R., p. 574 (143), V. 1], to which the petitioner entered his exceptions. The petitioner by objection to the admission of the purported confessions in the trial court and his exceptions to the Court's ruling raised the question of the admission of involuntary confessions against him and testimony obtained in violation of rights guaranteed to him under the Federal Constitution. [R., pp. 812-822, 838-841 (189-199, 215-218), V. 2.]

The court overruled his objections and exceptions to such testimony and admitted the same in evidence, to which the petitioner entered his exceptions.

Each of such questions was raised in the Court of Criminal Appeals of Texas by bills of exception, brief, and his first motion for rehearing (R., pp. 1326-1335, V. 2), and by his second motion for rehearing filed in the Court

of Criminal Appeals of Texas (R., pp. 1357-1368, V. 2), and the Court of Criminal Appeals of Texas refused to sustain petitioner's objections set forth in his brief, bills of exception and motions for rehearing, thereby affirming the action of the trial court.

SPECIFICATION OF ERRORS

The Court of Criminal Appeals of Texas erred:

1. In affirming the trial court's judgment and holding that there was no racial discrimination practiced against the petitioner on account of race and color by the District Judge in the appointment of the Grand Jury Commissioners who selected the Grand Jury which returned the indictment in this case.

2. In upholding the trial court's action in overruling petitioner's motion to quash the indictment on the grounds of racial discrimination by limitation in the selection of the Grand Jury Panel which returned the indictment against this petitioner.

3. In affirming the judgment and sentence of the trial court on the ground that the purported confessions were not obtained in violation of the provisions of the Constitution of the United States and federal laws.

4. In not holding that the State of Texas had enacted appropriate procedure through its Legislature for the vindication of rights, privileges, and immunities guaranteed under the United States Constitution and federal laws against the introduction of testimony obtained by adminis-

trative officers in violation of provisions of the Constitution of the United States and federal laws, and that such purported confessions were obtained in violation of the Federal Constitution and federal laws, and were therefore not admissible as evidence against petitioner.

5. In affirming the judgment and sentence of the trial court based upon the purported confessions obtained by police officers of the State of Texas through illegal and arbitrary incursion into the home of the petitioner, and his unlawful arrest and unlawful detention which resulted in the State obtaining such purported confessions, in violation of rights, privileges, and immunities guaranteed petitioner under the Fourth and Fourteenth Amendments of the Constitution of the United States.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI PRESENTED UNDER ERRORS ONE AND TWO

The decision of the Court of Criminal Appeals in this case is inconsistent with and directly contrary to the decisions of this Court in the following cases:

Fay v. People of New York, 67 S. Ct. 1613 (331 U. S. 261);

Hernandez v. State of Texas, 74 S. Ct. 667 (347 U. S. 475);

Patton v. State of Miss., 68 S. Ct. 184 (332 U. S. 463);

Pierre v. Louisiana, 59 S. Ct. 536 (306 U. S. 354).

There is no dispute in the evidence in this case that the District Judge who appointed the Grand Jury Commission who selected the Grand Jury which returned the indictment against petitioner excluded all Negro citizens from such Commission on account of race and color, and that he appointed only white citizens to such Commission with whom he was intimately acquainted, and that his intimate acquaintance was with white citizens only, and that such racial discrimination by the district judges of Dallas County had been practiced in the selection of Grand Jury Commissioners in Dallas County since 1926, as shown by the testimony of witness Judge Henry King [R., pp. 545-556 (114-125), V. 1]. In fact, no witness who testified knew of any case in the history of the courts of Dallas where a Negro citizen had been permitted to serve on a Grand Jury Commission. The District Judge in this case followed the pattern of racial discrimination in Dallas County, Texas, which had been practiced in the County as far back as the memory of any witness could recall, by excluding Negro citizens from the Commission on account of race and color and appointing Commissioners who selected the Grand Jury whose acquaintance with Negro citizens was limited or non existent, and the Grand Jury Commissioners thereby selected a Grand Jury Panel from white citizens with whom they were intimately acquainted, and excluded all eligible and qualified Negro citizens whom they did not know [Witness Charles Hansen, Grand Jury Commission, R., pp. 501-512 (70-81), V. 1] [Witness, Spencer, Grand Jury Commission, R., pp. 512-532 (81-91), V. 1].

The evidence is further without dispute that for a period of ten (10) years or more the Grand Jury Commissioners who had been appointed under the racial discrimination formula herein pointed out, in order to get just *one* (1) Negro on various grand juries, called a Negro citizen and requested that such person name *one* Negro citizen to serve on the Grand Jury Panel at intervals. He was requested to find one, and only one, and he would contact a Negro citizen and give the name of this citizen to the Grand Jury Commissioner who requested him to name one. [Witness C. F. Starks, R., pp. 451-456 (20-35), V. 1.]

When the Grand Jury Commissioners requested the witness Starks to name one Negro to serve on the Jury, they limited his information to them concerning Negroes to *one* Negro and only one Negro at the time, and they limited their efforts to become acquainted with eligible Negroes for the Grand Jury service to one Negro at the time.

Such evidence discloses a series of continuing acts of racial discrimination in the selection of grand jurors in Dallas County, Texas, by limitation on account of race and color. Such series of limitation of Negroes for jury service could not have been brought to pass except through human manipulation. The purpose of the Grand Jury Commissioners may not have been of an evil intent or in conscious disregard of what they conceived to be their binding duty. Still prohibited conduct may result from misconception of what duty requires as well as an evil intent or a conscious disregard of such binding duty.

The District Judge in this case set in motion the racial discrimination prohibited by the Constitution of the United States by intentionally, purposefully, and systematically excluding all Negroes from the Grand Jury Commission and limiting the appointment of members to the Grand Jury Commission to white citizens whom he knew intimately and white citizens whose backgrounds he had investigated, but failed or refused to investigate the backgrounds of any Negro citizens. The Grand Jury Commissioners selected white citizens for Grand Jury service with whom they were intimately acquainted and they, like the Judge, knew no Negro citizens whom they thought eligible for the Grand Jury Panel, and, therefore, appointed only white citizens as members of the Grand Jury Panel, except when they called upon one Negro citizen to name for them only *one* Negro to serve on the Grand Jury Panel at intervals. The formula of discrimination set in motion by the Judge through the above chain of events eliminated all qualified Negro citizens from the Grand Jury Panel and Grand Jury Commission that the District Judge and the Grand Jury Commissioners did not know and impaneled a Grand Jury composed of white citizens intimately known to the Commissioners, except occasionally when a Commissioner inquired of one Negro citizen to name for him *one* Negro and only one to be placed on the Grand Jury Panel. The pattern of racial discrimination set by the Judge ran through the whole course and procedure of selecting the Grand Jury Commissioners and the grand jurors who returned the indictment in this case,

for the appointment of the Grand Jury Commissioners by the District Judge from among white citizens only with whom he was intimately acquainted and excluded all qualified Negro citizens he did not know, and such white citizens appointed as Grand Jury Commissioners knew no eligible Negroes for Grand Jury service, therefore selected only white citizens with whom they were intimately acquainted to serve on the Grand Jury Panel and excluded all qualified Negro citizens from the Grand Jury Panel whom they did not know, or limited the Negro citizens to *one* on each Grand Jury where a Negro citizen was permitted to serve. Therefore, such racial discrimination was carried into and infected the Grand Jlry that actually returned the indictment against this petitioner with illegal racial discrimination forbidden by the Constitution of the United States.

The District Judge could not any more practice racial discrimination on account of race and color in the selection of the Grand Jury Commission at any stage of the procedure than the Commissioners themselves could practice racial discrimination against petitioner on account of race and color in the formation and selection of grand jurors, and whenever the State through its courts or administrative officers exclude persons of African descent and of Negro blood from Grand Jury service on account of race and color, such discrimination is contrary to the rights, privileges, and immunities guaranteed under the Fourteenth Amendment of the Constitution of the United States, as this Court

in the case of *Hernandez v. State of Texas, 74 S. Ct. 667 (347 U. S. 475)*, held:

> "In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers."

The racial discrimination practiced by the District Judge of Dallas County, Texas, is here shown without dispute, and is contrary to the opinion of the Court on the same issue, therefore, this Court has jurisdiction to grant the Writ of Certiorari applied for.

The list of Grand Jury Commissioners from the year 1940 up to and including the date the Grand Jury was impaneled which returned the indictment against the petitioner, was introduced in evidence [R., pp. 590-620 (159-160), V. 1]. Under the laws of Texas, four (4) Grand Juries are impaneled in Dallas County each year. Between January 1, 1940, up to and including the Grand Jury that was impaneled in January, 1954, 57 grand juries were impaneled in Dallas County, Texas. On the Grand Jury list introduced in evidence covering such period of time, the Negroes who served on any Grand Jury were indicated by circling the number opposite the names of Negro grand jurors. [R., pp. 590-620 (159-160), V. 1]. It is shown from that record that during such period of time 641 citizens of Dallas were selected as grand jurors and of this number 43 Negro

citizens were permitted to serve on Grand Juries. There were 12 citizens selected for the January, 1954, term of the court. Twelve (12) citizens, eleven (11) white and one (1) Negro, served on that Grand Jury. Therefore, from January 1, 1940, up to and including the Grand Jury Panel which indicted the petitioner, the number of white citizens who served on the grand juries was 641 and the number of Negro citizens was 43, and on many of the Grand Juries no Negro at all served and only on one Grand Jury Panel did more than one Negro serve, except the special Grand Jury which was impaneled to investigate the bombing of Negroes' homes in Dallas County, Texas, which Grand Jury was not one of the four (4) regular Grand Juries impaneled in Dallas County, Texas, yearly. It is significant to notice that the only regular Grand Jury in Dallas County where more than one Negro served was the first Grand Jury after this Court reversed the judgment of the Court of Criminal Appeals of Texas in the *Cassell* case.

The testimony from the Grand Jury Commissioners shows that there was only one Negro on the Grand Jury list from which the Grand Jury was selected that returned the indictment against the petitioner. The State makes no claim that more than one Negro was on any other Grand Jury list prepared by the Commissioners, except the first Grand Jury that was impaneled after the *Cassell* case was reversed, and the special Grand Jury impaneled to investigate bombing of homes in Dallas County, Texas. If there was such evidence, it was peculiarly within the State's knowledge. Upon the record in this case, there can be no assump-

tion that more than one Negro was placed on the Grand Jury list prepared by the Commissioners, for to assume that the Commissioners offered the Judge a list containing the names of more than one (1) Negro would lead to the inevitable conclusion that the Judge began his systematic, purposeful, and intentional discrimination with an appointment of the Grand Jury Commissioners and followed such formula of illegal discrimination, on account of race and color, in the selection of the list of prospective grand jurors tendered the Judge by the Commissioners.

Because of the erroneous interpretation of this Court's opinion in the *Cassell* case by the Court of Criminal Appeals of Texas, which erroneous interpretation denied rights guaranteed to petitioner under the Federal Constitution, this Court has jurisdiction to grant petitioner's Petition for Writ of Certiorari applied for herein.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI PRESENTED UNDER ERRORS THREE AND FOUR

The State in this case through its witness, Captain Will Fritz [R., pp. 812-822, 838-841 (189-199, 215-218), V. 2] admitted that the police officers entered the home of the petitioner without any semblance of authority to do so. The police officers arrested the petitioner without any semblance of authority, and they likewise placed him in jail and kept him imprisoned from 6 p. m. on January 30, 1954, until 2 p. m., January 31, 1954, without even advising him what they were investigating him for, and the

State did not file a charge against him of any character until the following Tuesday, February 3, 1954. When the police officers entered the petitioner's home, they were on a routine investigation of crime. The record reaches this Court upon the undisputed testimony that the entry by police officers into petitioner's home and his arrest and detention were not based upon any authority either in law or in fact.

The only circumstances under Texas laws when one may lawfully be arrested without warrant are: (1) when he commits a felony or a breach of the peace (a) within the presence or view of the officer or other person, Art. 212, C. C. P. 1925, or (b) in the presence or view of a magistrate who verbally orders his arrest, Art. 213; (2) when his arrest may prevent the consequences of theft, Art. 325; (3) when a peace officer is informed by a credible person that a felony offender is about to escape and there is no time to secure a warrant, Art. 215; (4) when the accused threatens to take the life of another, within the hearing of a magistrate, the magistrate may arrest him, if the case is one of emergency, Art. 73; (5) when he is an escaped prisoner, Art. 244, which is really a retaking and not an arrest; (6) when the ordinances of a city or town may authorize such action as to persons found in suspicious places or under circumstances reasonably showing that they have been guilty of some felony or breach of the peace or threaten or are about to commit some offense, Art. 214; and (7) generally, for any offense when the statute defining the same expressly confers the authority e. g., high-

way violations, under Art. 803, P. C. 1925; liquor violations, under Art. 666-30, Vernon's Ann. P. C.; unlawfully carrying arms, under Art. 487; rioting, under Art. 98, C. C. P., 1925; unlawful assembly, under Art. 101; disloyalty, under Art. 156, P. C. 1925.

The State does not claim and the evidence coming from State's witnesses shows conclusively that none of the conditions provided for by Texas statute existed giving the police officers authority to enter the petitioner's home without a search warrant or to arrest and imprison him without a warrant for his arrest first having been issued.

The petitioner testified [R., pp. 1133-1144 (506-517), V. 2] that after he had been placed in jail by the police officers, and before he was interrogated, a Negro prisoner was brought into the jail, and in plain view of the petitioner, was hit and kicked by such police officers who appeared to be wearing guns. This Negro prisoner was knocked to the floor by such officers and when he got up, he was bleeding from the mouth. After seeing another Negro prisoner beaten, kicked, and left bleeding by police officers, the petitioner was left to suffer from the anguish inflicted upon him by such psychological punishment. Such methods were used in order that no discernible marks on the victim would be found until 2 P. M. the following day, before the police officers started interrogating him for any purpose. These facts stand undisputed in the record. Petitioner was brought downstairs from his jail cell and was interrogated by Captain Will Fritz of the Police Department. He testified that Captain Fritz told him he was

guilty and that he had evidence of his guilt, but petitioner denied his guilt; that Captain Fritz told him not to dispute his word when Captain Fritz said he was guilty. He testified that he was afraid to dispute Captain Fritz' word by saying he was not guilty. [R., p. 1139 (512), V. 2.] Other portions of his testimony were disputed by Captain Fritz and other witnesses, but the above salient portions of his testimony were not contradicted by the State. Such procedure was more reprehensible than if a physical attack had been made. The psychological punishment was followed for no other purpose than to procure a confession as a means of convicting the petitioner.

To prevent the very type of conduct by police officers as here shown, the Legislature of the State of Texas enacted Article 727a of the Code of Criminal Procedure which the State through its Legislature deemed appropriate for the vindication of federal rights guaranteed to citizens under federal laws and the Federal Constitution, as well as under state laws and the Texas Constitution. That the State had authority to pass such law for the vindication of federal rights has never been questioned by this Court or the courts of the State of Texas.

In the opinion of this Court in the case of *Young v. Ragen, 69 S. Ct. 1073 (337 U. S. 235), at page 1074*, this Court held that the State of Illinois may choose the procedure it deemed appropriate for the vindication of federal rights.

The Court of Criminal Appeals of Texas in the case of *Cagle v. State, 180 S. W. (2d) 928, at page 937*, construed

Article 727a and by such construction placed upon it the purpose, meaning and effect of such statute against the introduction of testimony obtained by police officers of the State in violation of such statute and in violation of the Constitution and laws of the United States, and in the *Cagle* case the court held:

> "The courts, both state and federal, have been very zealous in guarding and protecting the security of a man's home against unreasonable searches and seizures, as guaranteed in our Bill of Rights, Art. I, Sec. 9, Constitution of Texas, and in the 4th Amendment to the Federal Constitution. A liberal construction has been adopted to preserve that right.
>
> "The Legislature of this State, in order to further protect and to safeguard these guarantees, has enacted special legislation upon the subject, Art. 727a, Vernon's Ann. C. C. P., which reads as follows:
>
> " 'No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case'.
>
> "Express authority for the passage of such statute exists under the rule that it is within the power of the State to prescribe the evidence which is to be received in the courts of its jurisdiction. Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905. The effect of said Art. 727a, C. C. P., is that, under the circumstances here presented, *if the testimony showing the result of the search was obtained in violation of the Constitution or laws of this State, or of the 4th or 5th Amendment to the Federal Constitution, its receipt in evidence is prohibited.* Such being true, the decisions of the Supreme Court of the United States

upon the question here presented should be first consulted; and, where applicable and controlling, they should be followed."

Thus, the highest court in Texas in criminal matters has determined the authority of the State to pass the provisions of the statute in question and its meaning and effect; that is, that where evidence is obtained in violation of federal laws and the Federal Constitution, it cannot be used as evidence upon a trial in any state court. Here the evidence is without dispute that the purported confessions were obtained in violation of the provisions of the Constitution of the United States and in violation of federal laws.

The undisputed testimony reflects that on the morning after the arrest of the petitioner [R., pp. 819-820 (196-197), V. 2], there were at least four (4) Justice of the Peace courts open in Dallas County, Texas, and the police officers knew that such courts were open; the police officers filed no charges against the petitioner, did not carry him before any Justice of the Peace or any other court, nor did they advise him of his right to counsel.

The questions then arise: (a) was the entry into the petitioner's home without warrant, his arrest without warrant, and his detention on the occasion in question unlawful and in violation of the provisions of the Federal Constitution; (b) if the police officers' entry into his home and his arrest and detention were unlawful, then were the purported confessions taken from him while he was under an unlawful arrest and being illegally detained after his home had been entered without warrant and the petitioner

unlawfully seized, a violation of the provisions of the Federal Constitution and federal laws. An unlawful arrest without warrant is protected under the Fourth Amendment to the Federal Constitution, the same as unlawful search and unlawful detention. The right under the Fourth Amendment against unlawful arrest is not interdependent upon unlawful search or unlawful detention, but each is a separate and distinct right protected under the Federal Constitution. Such right was recognized, that is, the right of personal security protected by the Fourth Amendment of the Constitution of the United States by this Court in the case of *Harris v. United States, 67 S. Ct. 1098 (331 U. S. 145), at page 1101.*

Texas, by the plain import of the language of Article 727a of the Code of Criminal Procedure, adopted all provisions and prohibitions in the Federal Constitution and federal laws as a part of the procedural process of admitting testimony in the courts of Texas obtained in violation of any provision of the Federal Constitution and federal laws, thereby making compliance necessary with all federal laws and all provisions of the Federal Constitution by police officers in obtaining evidence admissible in the courts of Texas. Whatever the rule might have been as to the admission of evidence in state courts in Texas obtained in violation of the provisions of the Federal Constitution and federal laws prior to the adoption of Article 727a, such rule was changed and the public policy of Texas was changed by such statutory enactment and such change of the rule of evidence is shown by the construction put upon

the Article by the Court of Criminal Appeals of Texas after its adoption. Therefore, the manner in which such purported confessions were obtained prohibited the admission of such testimony upon which the court rested its judgment of conviction.

Petitioner's arrest, his imprisonment, his detention and his interrogation while he was under an unlawful arrest and illegal detention, were likewise a violation of the provisions of the Federal Constitution and federal laws. (Rule 5 of Title 18, of the United States Code, entitled: "Federal Rules of Criminal Procedure.")

It is petitioner's contention that the violation of rights guaranteed to him under the Federal Constitution and federal laws which resulted in obtaining evidence (purported confessions) against him should have been excluded, as said by the Court of Criminal Appeals in the case of *Vinson v. State, 137 S. W. (2d) 1048:*

> "There seems no question but that appellant's arrest was illegal and the evidence obtained as a result thereof should have been excluded."

The arrest is admittedly in violation of federal laws and the Federal Constitution. Then the question arises: were the purported confessions obtained as the result of an illegal arrest?

Webster's Collegiate Dictionary, Fifth Edition, defines the word "result" when used as a verb—"to proceed,

spring, or arise as a consequence, or the effect." When used as a noun, the word "result" is defined: "that which results as a consequence of."

Standard lexicographers have defined the word "result" as being synonymous with the word "effect" and have further defined the words "result" and "effect" as meaning: "that which follows from an antecedent called the cause; the result or consequence of an act; that which is produced by an antecedent cause."

Here the antecedent cause was an illegal arrest—the unlawful arrest caused the unlawful detention of the petitioner and unlawfully placed the petitioner in custody of the officers who unlawfully interrogated him while he was being unlawfully detained, and by virtue of the arrest which enabled the officers to unlawfully detain and question the petitioner, the purported confessions resulted. The purported confessions obtained under the above conditions, were not admissible in evidence against the petitioner, even had they been obtained without any form of coercion, but were voluntarily given. This principle is better stated by the United States Court of Appeals, District of Columbia Circuit, in the case of *Garner, et al. v. United States, 174 F. (2d) 499 at pages 501 and 502;* the Court said:

> "In view of that holding, we must consider it to be a settled principle that, when arresting officers unnecessarily delay taking a prisoner before a committing magistrate, any confession made to them during that delay is inadmissible; *and that this is true even though the confession was not induced by the illegal detention nor by any form of coercion, but was voluntarily given.*"

Petitioner seriously urges that the purported confessions were the result of his unlawful arrest.

We come now to the question of causal connection between the unlawful arrest and detention of petitioner and the obtaining of the purported confessions.

As we understand the rule, causal connection is determined by the formula that if the first act which sets a chain of events in motion caused or contributed to cause the ill or evil complained of, or is the result of the first act which set a chain of events in motion, then causal connection is shown.

The arrest was unlawful in this case, which was the cause that set in motion a chain of unlawful events as follows: (1) unlawful detention; (2) unlawfully placing petitioner in a position where he was unlawfully questioned; (3) unlawful interrogation of the petitioner while he was unlawfully detained; (4) procuring signing of purported confessions while petitioner was being unlawfully detained as the result of his unlawful arrest.

The unlawful detention and the interrogation of the petitioner culminated into the signing of the purported confessions. Without the unlawful arrest having preceded the unlawful detention and questioning, the purported confessions would have never come into existence. All of such subsequent chains of events culminating in the purported confessions sprang into existence by reason of and as the result of the unlawful act in arresting the petitioner.

The position of the petitioner has been better stated and demonstrated in the opinion of the United States Court of Appeals of the District of Columbia in *Nueslein v. District of Columbia, 115 F. (2d) 690*, wherein the Court said:

> "The Fourth and Fifth Amendments relate to different issues, but cases can present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by unlawfully coming into his home and by placing him in custody. The defendant's statement to the officers that he was driving the cab now incriminates him, even though it does not fall within the Fifth because it does not come under the category of testimonial compulsion, a concept which has broadened as has the 'security' of the Fourth. But how did the officers find themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right. They did not know that the defendant was driving the car; they did not know that any offense had been committed. If they had gone after a search warrant what would have been the crime charged, what evidence would have been detailed as pertinent? The absence of a search warrant could scarcely make good an entry for which no warrant could have been obtained.
>
> "When the officers entered they were just investigating. They were still illegally investigating when the defendant told them that he was driving the cab at the time of the accident. The officers looking him over adjudged him to be drunk, and then, and not until then, two and two equaled a drunken driving charge—a charge which can be made without an accident, the only starting point for this investigation. Then the officers took the defendant into custody, again violating his security."

This Court has jurisdiction to grant the Writ of Certiorari in this case for the further reason, that the rights embodied in the Texas statute are so interwoven with the rights protected under the Federal Constitution and federal laws as to render them mutually dependent upon each other and must be construed together, and the rights under the Federal Constitution as embodied and embraced in the Texas statute must be determined under the provisions of such statute, the Constitution of the United States and the laws of the United States, and his rights cannot be determined upon the record in this case without a construction and a determination of his rights under the Constitution of the United States and federal laws, for this Court has consistently held, where a nonfederal right is so interwoven with a federal right as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without a decision of the federal question, the jurisdiction of this Court is plain. And such was the holding by this Court in *Abie State Bank v. Weaver, 51 S. Ct. 252 (282 U. S. 765), at page 256.* The jurisdiction of this Court to grant the Writ applied for appears to be fully sustained in the case of *Creswill v. Grand Lodge Knights of Pythias, 32 S. Ct. 822 (225 U. S. 246), at page 827.*

The petitioner claimed protection and rights guaranteed under the Federal Constitution and federal laws which rights, privileges, and immunities were embraced in the Texas Statute (Article 727a) enacted as an appropriate vindication of rights guaranteed to petitioner under the Federal Constitution and federal laws, and the Court of

Criminal Appeals of Texas denied to rights asserted under local laws protection guaranteed under the Federal Constitution as well as under such laws.

Therefore, the denial of such right is a question upon which this Court has jurisdiction and a right upon which petitioner is entitled to have his Writ of Certiorari applied for herein granted.

The evidence as to the violation of the petitioner's rights guaranteed under local laws as well as federal laws and the Constitution of the United States reaches this Court undisputed.

Therefore, this Court has the power and authority to inquire whether the decision of the state court denying such constitutional protection and rights as are asserted by petitioner under the Texas statute rests on a fair or substantial basis though the court might have rested its judgment on a nonfederal ground. The court rested its judgment in this case upon a federal ground and upon undisputed evidence that the petitioner's rights had been violated under the provisions of the Constitution of the United States and federal laws. This Court, your petitioner says, has jurisdiction upon the record and the law to grant the Writ of Certiorari herein sought under the opinion by this Court in the following cases:

Demorest, et al. v. City Bank Farmers Trust Co., et al., Dyett v. Title Guarantee & Trust Co., et al., 64 S. Ct. 384 (321 U. S. 36), at p. 388;

Broad River Power Co., et al. v. State of South Carolina, ex rel. Daniel, 50 S. Ct. 401 (281 U. S. 537), at p. 402.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI PRESENTED UNDER ERROR NUMBER FIVE

The act of the trial court in rendering a judgment of conviction against petitioner upon testimony shown by the undisputed testimony to have been obtained in violation of rights guaranteed petitioner under the Federal Constitution and the affirmance of such judgment by the Court of Criminal Appeals of Texas, is a sanction by the State of Texas of the arbitrary incursion of police officers of the State into the petitioner's home and a violation of the personal security of the petitioner in violation of rights, privileges, and immunities guaranteed petitioner under the federal laws and the Constitution of the United States, in that the State of Texas affirmatively sanctions such arbitrary and unlawful incursion by police officers into the privacy of petitioner's home, which conduct and act runs counter to the guaranty of the Fourth and Fourteenth Amendments of the Constitution of the United States against such action by the State. This case comes to this Court as to the manner in which such testimony was obtained on the undisputed facts that it was obtained in a flagrant violation of petitioner's rights under both the State and Federal Constitutions, and state and federal laws. This Court is not required to debate the

truth of the manner by which such testimony was obtained. The action of the State of Texas, through the trial court and the Court of Criminal Appeals of Texas, sanctions the violation of the rights of this petitioner guaranteed under the Federal Constitution against an illegal arrest and illegal detention and the unlawful incursion of police officers into the petitioner's home, therefore, when the State through its judiciary affirmatively sanctions such violation of petitioner's rights, it becomes state action prohibited under the Federal Constitution. This rule of law was clearly announced in *Shelley v. Kraemer, 68 S. Ct. 836 (334 U. S. 1)*, and the late Mr. Justice Vinson speaking for the Court said:

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."

The State by the judgment of the trial court and the judgment of the Court of Criminal Appeals of Texas having affirmatively sanctioned such illegal incursion of police officers into petitioner's home and resting the judgment of conviction upon such unlawful actions of police officers and the fruits of their unlawful conduct, violated rights guaranteed petitioner under the Federal Constitution against such unlawful conduct, and such action by the State of Texas is prohibited under the Federal Constitution and a right this Court will protect by its power, as held by this Court in the case of *Stefanelli v. Minard*,

et al., 72 S. Ct. 118 (342 U. S. 117), at page 119, wherein the court held:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Again this question arose in the case of *Wolf v. People of the State of Colorado, 69 S. Ct. 1359 (338 U. S. 25), at p. 1361*, and again this Court held:

> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order."

The Court in the above case stated the ways of enforcing such basic rights as here contended for raised questions of different order. The State of Texas has answered for itself the way such basic rights shall be enforced, that is, that evidence obtained in violation of federal laws and the Federal Constitution shall not be received as evidence in any court of this State against the petitioner. Therefore, this Honorable Court does not have to search for a way to protect such basic rights in Texas. Texas has provided a way to protect such basic rights, for the Legis-

lature of Texas has by clear and concise language provided for an enforcement and protection of such basic rights.

The Court of Criminal Appeals of Texas sanctioned the unlawful incursion of police officers into the petitioner's home and his unlawful detention and the unlawful acts of police officers in obtaining the purported confessions as the result of their unlawful acts, which action of the Court of Criminal Appeals sanctioned the conviction and the taking of the life of petitioner by the State of Texas in violation of rights guaranteed under the Constitution of the United States.

Because of the recurrent and fundamental character of the questions presented in the petition and constantly and erroneously determined by the Texas Court of Crimial Appeals, would, it appears, impel this Court to grant the Writ, in order that the opinion of this Court on the same questions might never hereafter be misinterpreted by the Texas Court of Criminal Appeals on the fundamental and basic questions here presented. This appears to be the rule laid down in the opinion of this Court in the case of *Thomas Quinn, Petitioner v. United States of America, 75 S. Ct. 668 at page 670*, wherein the Court said:

> "We granted the writ because of the fundamental and recurrent character of the question presented."

Therefore, petitioner urges upon this Court that it has jurisdiction and upon the facts in the record in this case and the law, petitioner is entitled to have his application for Writ of Certiorari granted.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Texas should be granted, and the judgment of the Court of Criminal Appeals reversed.

Respectfully submitted,

Tommy Lee Walker
TOMMY LEE WALKER,

W. J. DURHAM and
J. L. TURNER, JR.,
Excelsior Life Building,
2600 Flora Street,
Dallas, Texas,
Attorneys for Petitioner

By .....

UNITED STATES OF AMERICA
STATE OF TEXAS
COUNTY OF DALLAS

I, Tommy Lee Walker, being duly sworn, depose and say that I am the petitioner in the above entitled cause; that I have read the foregoing petition and that the same is true as I verily believe.

Tommy Lee Walker
TOMMY LEE WALKER

SUBSCRIBED AND SWORN to before me by the petitioner, Tommy Lee Walker, on this the 1 day of Sept, 1955.

Harold Stuckey
Notary Public in and for
Dallas County, Texas.

I, W. J. DURHAM, one of the attorneys for petitioner, admitted to practice in the Supreme Court of the United States, hereby certify that I prepared the foregoing Petition for Writ of Certiorari and know the contents thereof; that the same is not made for the purpose of delay; and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the Writ issued.

W. J. DURHAM

U. SIMPSON TATE,
KENNETH F. HOLBERT,
Of Counsel.

PROOF OF SERVICE

I, W. J. Durham, one of the attorneys for Tommy Lee Walker, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of September, 1955, I served a copy of the foregoing Motion for Leave to File a Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas, in the Supreme Court of the United States and Petition for Writ of Certiorari, as follows:

(1) On the Honorable JOHN BEN SHEPPERD, Attorney General of the State of Texas, by mailing a copy in a duly addressed stamped envelope with registered mail, postage prepaid, to the Capitol Building, in Austin, Texas, and,

(2) On the Honorable HENRY WADE, District Attorney of Dallas County, Texas, Attorney of record for the State of Texas, Respondent, by mailing a copy in a duly addressed stamped envelope, postage prepaid, to the Records Building, Dallas, Texas.

W. J. DURHAM

APPENDIX A.

Constitutional and Statutory Provisions of Texas

Constitutional Provisions

Article V, Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI, Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

STATUTORY PROVISIONS

Texas Code of Criminal Procedure:

Article 727a (V. 2, p. 1173): "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

Article 333 (V. 1A, p. 2): 'The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

"1. Be intelligent citizens of the county and able to read and write.

"2. Be qualified jurors and freeholders in the county.

"3. Be residents of different portions of the county.

"4. Have no suit in said court which requires the intervention of a jury."

Article 335 (V. 1A, p. 7): "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged'."

Article 336 (V. 1A, pp. 7-8): "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish

them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338 (V. 1A, pp. 8-12): "The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court."

Article 339 (V. 1A, pp. 13-16): "No person shall be selected or serve as grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340 (V. 1A, pp. 17-18): "The names of those selected as grand jurors by the commissioners shall be

written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 354 (V 1, p. 26): "In trying the qualifications of any person to serve as a grand juror, he shall be asked:

"1. Are you a citizen of this State and county, and qualified to vote in this county, under the Constitution and laws of this State?

"2. Are you a freeholder in this State or a householder in this county?

"3. Are you able to read and write?"

Article 371 (V. 1A, pp. 45-46): "Nine members shall be a quorum for the purpose of discharging any duty or exercising any right properly belonging to the grand jury."

Article 391 (V. 1A, pp. 55-56): "After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment, and, if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable

the attorney who represents the State to write the indictment."

Article 393 (V. 1A, p. 58): "When the indictment is ready to be presented, the grand jury shall go in a body into open court, and, through their foreman, deliver the indictment to the judge of the court. At least nine members of the grand jury must be present on such occasion."

CONSTITUTION OF THE UNITED STATES

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1: "All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 5, United States Code Annotated, Vol. Entitled: "Federal Rules of Criminal Procedure" subsection (a): "*Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

APPENDIX B

No. 5213

IN THE CRIMINAL DISTRICT COURT, NUMBER 1
DALLAS COUNTY, TEXAS
STATE OF TEXAS

v.

TOMMY LEE WALKER

MOTION TO QUASH INDICTMENT

To the Honorable Judge of Said Court:

COMES NOW TOMMY LEE WALKER, the defendant in the above entitled and numbered cause, and before pleading to the purported indictment, moves the court to quash the indictment in this cause, which indictment and cause is Number 5213 upon the docket of the Criminal District Court Number 1, Dallas County Texas; said purported indictment having been returned in this court during the January, 1954, term of this court, and for such motion, this defendant alleges:

I

That the Honorable Harold B. Wright, the duly elected qualified and acting judge of the Criminal District Court Number 1 of Dallas County, Texas, on January 1, 1954, and at all times and dates since January 1, 1954, as well as on all dates mentioned in this motion was the duly elected, qualified and acting judge of said court, and he is a white man and a member of the Caucasian race, and

that he purposefully and intentionally selected all white men for the Grand Jury Commission for the January 1954 term of this court wherein a Grand Jury was selected by said Commissioners, and said Grand Jury returned the purported indictment against this defendant; that said judge purposefully, systematically, and intentionally appointed and included only white males and members of the Caucasian race on said Grand Jury Commission and as grand jury commissioners said white persons and members of the Caucasian race who constituted said Grand Jury Commission appointed a Grand Jury which returned the purported indictment against this defendant, and that said District Judge purposefully, intentionally, and systematically excluded and failed to appoint any member of the Negro race or any person of African descent on said Grand Jury Commission on account of race and color, and said members of the Negro race and of African descent were excluded and were not apopinted as members of the aforesaid Grand Jury Commission on account of race and color by the aforesaid District Judge who was then and at all times mentioned in this motion acting as an officer and administrative officer of the State of Texas, and that each of the aforesaid commissioners so appointed, to-wit:

by said District Judge was at all times mentioned and to be mentioned in this motion acting as an administrative officer of the State of Texas and was performing an essential governmental function.

II

That the defendant, Tommy Lee Walker, is an American Negro, is of African descent and is a citizen of the United States and of the State of Texas, and by said purported indictment is charged with the offense of murder, and it is alleged in said purported indictment that said defendant on or about the 30th day of September, 1953, in Dallas County, Texas, did with malice aforethought kill Venice Loraine Parker by cutting and stabbing her with a knife. That Venice Loraine Parker was a white woman and a member of the Caucasian race, and the aforesaid Honorable Harold B. Wright, Judge of this court is a white person and member of the Caucasian race, and the aforesaid Grand Jury Commissioners who selected the members of the Grand Jury which returned the purported indictment, are members of the white or Caucasian race, and said District Judge purposefully and intentionally included on said Grand Jury Commission only white persons and members of the Caucasian race, and purposefully and intentionally excluded from said Grand Jury Commission all persons and members of the Negro race and of African descent on account of race and color. That at the time the aforesaid District Judge selected and appointed the members of the Grand Jury Commission who selected the members of the Grand Jury which returned the purported in-

dictment against this defendant, and for more than fifty (50) years immediately prior thereto and ever since said date the aforesaid District Judge and his predecessors in office have purposefully and intentionally pursued a policy, practice and custom of selecting only members of the white or Caucasian race as members of the Grand Jury Commission in Dallas County, Texas, and purposefully and intentionally excluding therefrom and from serving as grand jury commissioners in Dallas County, Texas, all members of the Negro race and of African descent, and because of the intentional, purposeful and systematic exclusion of qualified citizens in Dallas County, Texas, on account of race and color from serving on grand jury commissions and as grand jury commissioners for a period of more than fifty (50) years in Dallas County, Texas, prior to the date the purported indictment was returned, and from serving on the Grand Jury Commission and as Grand Jury Commissioners which returned the purported indictment against this defendant, violated rights guaranteed to the defendant under the Constitution and laws of the State of Texas and under Federal laws and the Federal Constitution, and because of such facts said indictment is void and charges no valid subsisting offense by indictment against this defendant.

III

That on January 1, 1954, and for a long time prior thereto, and ever since said date, there were in Dallas County, Texas, forty thousand (40,000) male citizens of the Negro race and of African descent who were above

the age of twenty-one (21) years, and that more than seventy-five (75%) per cent of said male citizens of the Negro race and of African descent were intelligent citizens, and were able to read and write the English Language. That a large percentage of said male Negro citizens were freeholders in Dallas County, Texas, and resided in different portions of said County and more than seventy-five (75%) per cent of said male Negro citizens had no law suits pending in the courts of Dallas County, Texas, which required the intervention of a jury, and that seventy-five (75%) per cent of said male Negro citizens were eligible to vote under the Constitution and laws of the United States and the State of Texas and that more than seventy-five (75%) per cent of said Negro male citizens were not under indictment for a felony or any other offense, and had not been convicted of a felony at any time; but, notwithstanding all of the foregoing facts, the aforesaid District Judge of Dallas County, Texas, in the selection of said Grand Jury Commissioners purposefully and intentionally included only white citizens or members of the Caucasian race, and purposefully and intentionally excluded from the Grand Jury Commission all members of the Negro race and of African descent on account of race and color, and that this defendant was deliberately, intentionally, purposefully and systemtically discriminated against in the selection of said Grand Jury Commission and Commissioners constituting said commission, both by exclusion and limitation on account of race and color, and that because of such deliberate, intentional and purposeful exclusion and limitation in discriminating against this de-

fendant, on the account of race and color, this defendant has been denied rights guaranteed to him under the Constitution of the United States, and because of such illegal discrimination, said indictment against this defendant is void.

IV

That the State of Texas, notwithstanding each and all of the foregoing facts with reference to the number of qualified members of the Negro race eligible to serve as grand jury commissioners, acting by and through its aforesaid officers and administrative agents has consistently pursued and maintained and is now pursuing and maintaining the policy, custom and usage of excluding persons of African descent and of Negro blood from serving as grand jury commissioners in Dallas County, Texas, and under such policy, custom and practice, and because of said unlawful discrimination no persons of African descent and Negro blood have been permitted to serve or selected to serve as grand jury commissioners for a period of more than fifty (50) years prior to the date the aforesaid purported indictment was returned against this defendant and that all Negro citizens have been excluded from grand jury commissions, as hereinbefore alleged, on the account of race and color, and that such exclusion of Negroes to serve as grand jury commissioners in Dallas County, Texas, as herein alleged was intentional, systematic, arbitrary and purposeful on the part of the State of Texas, acting through its duly elected officers and officials and through its administrative officers, and that said illegal

discrimination practiced against the members of the Negro race and this defendant was done on account of race and color and that said indictment is void in that it denies to plaintiff equal protection of law as well as due process of law and rights guaranteed to this defendant under the Federal Constitution.

V

The defendant further pleading herein says that said indictment is void for the further reason that for more than fifty (50) years immediately prior to the date the Grand Jury Commission was appointed and more than fifty (50) years prior to the date the Commissioners composing the Grand Jury Commission which appointed and selected the Grand Jurors who returned the purported indictment against this defendant, and all grand jury commissioners who had been appointed by the District Judges of Dallas County, Texas, including the present District Judges of the Criminal District Courts of Dallas County, Texas, and their predecessors in office, have limited and did limit on the Grand Jury which returned the purported indictment against this defendant, the number of persons of Negro blood and of African descent to one (1) and only one (1) on each of said grand juries where persons of African descent and of Negro blood were permitted to serve; and the limiting of one (1) person of African descent and of Negro blood was purposefully and intentionally done by said grand jury commission and commissioners on account of race and color since the year 1941, and that persons of African descent and of Negro blood were

limited to one (1) and only one (1) by said commissioners on account of race and color upon the Grand Jury which returned the purported indictment against this defendant, and that since the year 1941, the Grand Jury Commissioners appointed by the District Judges of Dallas County, Texas, both past and present, have purposefully and intentionally limited persons of Negro blood and African descent to one (1) and only one (1) on all of the grand juries impaneled in Dallas County, Texas, and he specially alleges that the Grand Jury Commissioners who appointed and selected the Grand Jury which returned the purported indictment against this defendant followed a policy, custom and practice of the Grand Jury Commissioners who have selected grand jurors in Dallas County, Texas, since the year 1941 in purposefully, systematically and intentionally limiting the number of persons of African descent and of Negro blood on the present grand jury to one (1) and only one (1) which is the same grand jury that returned the purported indictment against the defendant; and that under the aforesaid policy, custom, practice and system, during all of the period of time embraced between the year 1941 and the date said purported indictment was returned against this defendant, said grand jury commissioners limited, on account of race and color, persons of African descent and Negro blood to one (1) on each and all of the grand juries selected since the year 1941, and that because of such unlawful racial discrimination by limitation, this defendant has been denied rights guaranteed to him under the Federal Constitution and Federal

Law and under the State Constitution and State Law, and said purported indictment is null and void and ought to be quashed by the judgment of this court.

WHEREFORE, this defendant prays that the Court examine into the facts herein charged, and of the violation of his constitutional rights herein alleged, and upon final hearing hereof, this defendant prays that the Court quash the indictment in this cause, and that said indictment be adjudged and decreed to be null and void, and that this defendant be discharged under said indictment, and he prays that the Court make such other orders and decrees in the premises protecting the constitutional rights of this defendant as justice and the law demand.

W. J. DURHAM,
Excelsior Life Building,
2600 Flora Street,
Dallas, Texas.

K. F. HOLBERT,
Excelsior Life Building,
2600 Flora Street,
Dallas, Texas,
Attorneys for Defendant.

By:.....

COMES NOW the defendant Tommy Lee Walker in the above matter and states upon oath that he is cognizant of the foregoing facts set out in the foregoing motion, and upon oath states that the facts herein set out are within his knowledge true and correct as to exclusion of persons of Negro blood and of African descent from Grand Jury Commissions and as Grand Jury Commissioners (and as to the limitation of persons of African descent and of Negro blood on Grand Juries in Dallas County, Texas).

SUBSCRIBED AND SWORN TO BEFORE ME this ..... day of February, 1954.

.....

Notary Public in and for
Dallas County, Texas

APPENDIX C

Tommy Lee Walker, Appellant
No. 27,390. v. —Appeal from Dallas County
The State of Texas, Appellee

OPINION

The offense is murder; the punishment, death.

Mrs. Parker was mortally wounded some time between 8:55 and 9:10 on the night of September 30, 1953, in the vicinity of Love Field in the City of Dallas. The cause of death was a knife wound in her throat which severed her jugular vein. She also received other bruises to her face and body and had been raped. The only question is the identity of the appellant as her assailant. The appellant, a nineteen-year old member of the colored race, was arrested on January 29, 1954, and thereafter made two written confessions in which he admitted that he had seen a woman at a bus stop on Lemmon Avenue and had forced her at knife point to go down into the bed of the creek near the bridge, and that her throat had been cut while he was in the act of robbing her. He did not admit the rape. Appellant's defense was that of alibi, in which he was supported by the testimony of his witnesses and which defense the jury rejected. With this summary as a background, we shall give a more detailed statement of the facts.

Mrs. Parker's employer testified that she left work at 8:55 p. m. and walked toward the bus stop, which the

evidence shows is in the vicinity of a bridge on Lemmon Avenue.

R. R. Ryan testified that he saw a young colored man who, in his opinion, was the appellant leaning against a post on Lemmon Avenue about one-half a block north of the bridge at approximately 8:55 p. m. on the night in question.

Mrs. Kluge testified that she saw the appellant walking south on Lemmon Avenue in the direction of the bridge at approximately 9:00 p. m. and that shortly thereafter she saw Mrs. Parker also proceeding in the same direction.

Both of these witnesses identified the appellant at a police lineup shortly after his arrest.

Mr. Clarkson testified that at approximately 9:10 p. m. he saw Mrs. Parker in the middle of Lemmon Avenue near the bridge; that he stopped his automobile, asked her what had happened, and she replied that she had been stabbed; that he put her in his automobile and proceeded to Love Field, where he summoned the police and an ambulance; that the trip required three or four minutes; and that the police arrived four or five minutes thereafter.

Officer Gallaher testified that, in response to a call, he went to Love Field, where he saw Mrs. Parker at approximately 9:18 p. m. on the night in question; that she told him her name and address and said, "A negro took me under the bridge and cut my throat"; that shortly thereafter he sent her to the hospital in an ambulance, but that she was dead on arrival.

Captain Fritz testified that he arrived at the scene of the homicide shortly after its discovery; that he found a woman's panties, together with eye glasses and a purse, which were shown to have been the property of Mrs. Parker, under the bridge. He testified further that the appellant was arrested on the night of January 29; that he talked to him two or three times for short intervals; that on January 30 he signed a written confession in which he admitted that Mrs. Parker had been cut in the throat while he was in the act of robbing her; and that thereafter the appellant was transferred from the city to the county jail.

Millard Sweatt, investigator for the district attorney's office, testified that on February 6 he and Henry Wade, the District Attorney, interrogated the appellant and that the appellant signed a written confession which, though in slightly different phraseology, was practically identical to that given to Captain Fritz.

The facts will be more fully discussed in connection with the contentions raised by appellant's two able attorneys in their brief and oral argument.

Appellant moved to quash the indictment on the grounds of racial discrimination in the selection of the jury commissioners who selected the grand jury which indicted him and in the selection of the grand jury itself.

As to the jury commissioners, the proof is very similar to that which was before this Court recently in *Morris v. State, 251 S. W. 2d 731 (writ of certiorari denied)*, and

Addison v. State, 271 S. W. 2d 949. What we said in those cases, we think, disposes of appellant's first contention.

As to the grand jury, we must examine the record further. As in the Addison case, there was no showing of express or intentional discrimination in the selection of the grand juries in Dallas County. Clarence Jackson, a negro, was a member of the grand jury which returned the instant indictment. It was shown that a negro had been on each of the grand juries impaneled in Dallas County for the last ten years except three, and that two grand juries had had two negroes serving on them during that period. There was no showing as to the racial composition of the grand jury panels of sixteen names from which a grand jury of twelve was chosen, except that on one occasion three negroes had been on the panel.

Appellant offered the testimony of two of the jury commissioners who selected the grand jury which returned the instant indictment. Commissioner Hansen testified that he recommended Clarence Jackson because he knew him personally, knew that he was a deacon of the church and a very worthy and trusted employee of the Federal Reserve Bank; that he mentioned to his fellow commissioners that Mr. Jackson was a member of the colored race; and that he found out later that he was the only member of that race selected by him and his fellow commissioners but that he did not know the racial background of some of the other grand jurors at the time of their selection.

Commissioner Spencer testified that he was told by a fellow commissioner that Clarence Jackson was a member

of the colored race and that his five selections for the grand jury were intimate acquaintances of his whom he knew to be so situated in business that they might spare three months to serve.

C. F. Starks, a member of the colored race, testified that he had served on the grand jury about ten years ago and that frequently since that time the Dallas County jury commissioners had called upon him for advice in the selection of members of the colored race for grand jury service. Appellant contends that the aid which the commissioners got from Mr. Starks was unofficial and illegal. It would seem to us, rather, that the commissioners were attempting to comply with the mandate of the Supreme Court of the United States in *Cassell v. Texas, 339 U. S. 282*, wherein the Court said:

> "Their responsibility was to learn whether there were persons among the Negroes they did not know who were qualified and available for service."

Appellant's second motion to quash the indictment is predicated upon the contention that the jury commissioners failed to sign their names across the flap of the manila envelope containing the grand jury list before they delivered it to the judge in open court. From the testimony of the two jury commissioners who testified at the hearing on the motion, it is apparent that when first questioned one of them forgot having written his name across the back of the envelope but was called back the following day and testified that he had done so.

Bill of exception No. 3 is directed to the testimony of Henry Wade, District Attorney, in which mention is made of a lie detector test having been given the appellant. It is unnecessary to discuss the details of how this evidence got before the jury during the course of Mr. Wade's testimony because the same testimony was admitted, without objection, while the appellant was testifying in his own behalf.

Bill of exception No. 4 complains of argument of the prosecutor in which he stated the deceased was at the time of her demise making a living for a 4-year-old boy and for her husband who was a tubercular in a hospital. Appellant's complaint is that this argument was outside the record. We shall examine this contention. Mrs Parker's employer testified that she was regularly employed by him in the toy department and that her hours were from 12:00 noon until 9:00 p. m. Mrs. Parker's mother testified that since the death of her daughter she had been keeping her son, who was five years old at the time of the trial, and that Mr. Parker was in the T.B. Hospital. We agree with the trial court that the argument was a reasonable deduction from the evidence.

Bill of exception No. 5 complains that appellant's trial was halted so that the court might sentence one Klinedinst to death. The court's qualification of the bill and the evidence adduced in support of the bill shows that no prospective juror was in the courtroom at the time Klinedinst was sentenced. There is no showing that any member of the panel who may have been in the corridor at the time Klinedinst was escorted to and from the courtroom knew who he

was or the reason for his visit to court, nor did the appellant question them about the incident. The bill does not reflect error.

Bill of exception No. 6 complains of the testimony of Officer Gallaher set forth earlier in this opinion. The statement was clearly res gestae. Appellant's contention that it was incumbent upon the State to prove that Mrs. Parker was competent and in full possession of her faculties at the time she made the statement is inconsistent with a long line of decisions of this Court which hold that a res gestae statement is admissible even though the person who made it is incompetent as a witness. See *Haley v. State, 247 S. W. 2d 400; Jones v. State, 238 S. W. 2d 529;* and *Heflin v. State, No. 27,352 (not yet reported).*

Bills of exception Nos. 7 and 8 are directed to the court's charge. In his brief the appellant says, "The court, by such provision of the charge, permitted the jury to find that the appellant signed the purported confessions from a preponderance of the evidence, and they were not required to believe that he signed it or find that he signed it from the evidence beyond a reasonable doubt." Without analyzing whether appellant's contention is well taken, we observe that the appellant admitted that he signed both confessions and that each bore his genuine signature. It thus follows that no issue was raised as to the actual execution of the confessions, and no harm could have resulted if the charge assumed that it had been executed by the appellant.

Bill of exception No. 9 is directed to the admission of the confessions. It is appellant's contention that, since the offi-

cers had no warrant for the appellant's arrest, any confession which they secured from him would be inadmissible because of the unlawful arrest. We had a similar contention before us in *Head v. State, 267 S. W. 2d 419*. There we said:

> "* * * the appellant has confused illegal arrest and illegal detention following arrest. It is the detention and not the arrest which this Court and the Supreme Court of the United States hold under some circumstances vitiates a confession."

Appellant contends that the amendment of Article 727a, V. A. C. C. P., by the 53rd Legislature is controlling here because of the addition of the words "or laws of the United States." He cites no Federal statute but relies upon Rule 5 of the Federal Rules of Criminal Procedure as promulgated by the Supreme Court of the United States, which provides that the arresting officer shall take the person arrested forthwith before a commissioner. We must hold that the phrase "laws of the United States" applies to acts of Congress and not judicial rules or decisions.

It has been the consistent holding of this Court, and of the Supreme Court of the United States in passing on State court cases, that the rule in *McNabb v. U. S., 87 L. Ed. 819*, does not apply and that the failure to take an accused forthwith before a magistrate does not in itself standing alone vitiate a confession. *Dimery v. State, 240 S. W. 2d 293; Gallegos v. Nebraska, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 36; Shook v. State, 244 S. W. 2d 220; Leviness v. State, 247 S. W. 2d 115; Golemon v. State, 247 S. W. 2d*

119 (writ of certiorari denied); Gasway v. State, 248 S. W. 2d 942 (writ of certiorari denied); Paris v. State, 249 S. W. 2d 217 (writ of certiorari denied); Hulen v. State, 250 S. W. 2d 211; Stroble v. California, 343 U. S. 181, 72 S. Ct. 599, 98 L. Ed. 872; Stein v. N. Y., 348 U. S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522.

Bill of exception No. 10 complains of the admission of the second confession to Millard Sweatt and Henry Wade on the grounds that there was no showing that Henry Wade had given the appellant any warning. The confession states on its face that it was made to Millard Sweatt, who had warned the appellant. Sweatt testified that he gave the warning. Appellant relies upon *Grice v. State, 29 S. W. 2d 783.* In that case we held a confession made after the accused had been warned by "the grand jury" was not admissible. Such holding does not find application here. What the statute requires is that some named individual give the warning and that the confession be made to him. This requirement has been met in this case.

Bill of exception No. 11 relates to appellant's motion to suppress the confessions. Such a motion is not a part of the procedure recognized in this jurisdiction. *Dominguez v. State, No. 27,248 (not yet reported).* We will, however, examine closely all the evidence which relates to the voluntary nature of the confessions. We do this in every case.

Appellant claimed no brutality or long and uninterrupted questioning. He did claim that prior to being interrogated by Captain Fritz he had seen some officers, one of

whom was wearing a gun, slap another prisoner in the jail. He stated that Captain Fritz insisted that he was guilty and, when he denied his guilt, that Fritz said he was calling him a liar and told him he would call in two men from upstairs. He denied that he had told Captain Fritz that he had sold the knife to a boy for thirty-five cents, which statement was incorporated in the confession. He stated that Sweatt had told him that Henry Wade was the only person in the world who could help him and that Wade told him he wanted a confession for his files and that he would not ask the jury for the electric chair and that there were present when he made the second confession some of the officers whom he had seen whip the prisoner.

Each of the persons named was called in rebuttal and denied that portion of appellant's testimony set forth above. There is, therefore, no undisputed fact in this record that would render the confessions inadmissible.

The final bill relates to the court's failure to grant a continuance because of the absence of a material witness. The court qualified the bill and certified that the witness named in the motion was produced in court and, though made available to the accused, was not called as a witness.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Presiding Judge

(Delivered February 9, 1955)

APPENDIX D

Tommy Lee Walker, Appellant
No. 27,390, v. —Appeal from Dallas County
The State of Texas, Appellee

OPINION
ON APPELLANT'S MOTION FOR REHEARING

Appellant insists that we were in error in overruling his contention that racial discrimination was practiced against members of the Negro race in the selection and organization of the grand jury that returned the indictment in this case.

In deference to this insistence, we have again reviewed the testimony touching this question and remain convinced that a correct conclusion was reached originally.

We can but add to what we said originally the observation that in our opinion this record reflects that the grand jury commissioners, in drawing the instant grand jury, fairly and honestly performed the duties incumbent upon them not to discriminate against any race, nationality, creed, or class entitled to be given recognition or consideration in the drawing thereof.

It must be remembered that the guarantee of the Fourteenth Amendment against discrimination in the organization of a grand jury is not limited or restricted to members of the different races but extends to and includes all classes and groups which, by reason of some special condition or

fact situation, are established in the particular county or community. *Hernandez v. Texas, 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667.*

It follows, therefore, that in the drawing and selection of a grand jury in this state all races, nationalities, and established classes are entitled to the same treatment and consideration in order that discrimination not be practiced against the members of any particular group or as between the several classes which are entitled to the same protection against discrimination.

Under the facts here presented, we are unable to arrive at the conclusion that members of the Negro race were discriminated against because of their race in the organization of the instant grand jury.

Appellant's challenge of the correctness of our conclusion that that part of Art. 727a, Vernon's C. C. P., which includes the "laws of the United States" has reference only to the act of Congress has given us much concern.

In support of his contention that federal rules of criminal procedure are laws of the United States, appellant calls to our attention the fact that Congress conferred upon the United States Supreme Court the power to promulgate rules of procedure governing the trial of criminal cases in the federal courts (Title 18, Sec. 3771, Chap. 237) and also that there is express federal authority for the conclusion that a rule so promulgated under the power of and not vetoed by Congress has all the force and effect of a statute

or law of the United States. *Barkman v. Sanford, 162 F. 2d 592; Rattley v. Irelan, 197 F. 2d 585.*

Upon further consideration, we have concluded that a determination of the question as to whether federal rules of procedure are laws of the United States within the meaning of Art. 727a, Vernon's C. C. P., is not necessary inasmuch as we have reached the conclusion that this case, under the facts presented, is governed by the rule announced by us in *Dimery v. State, 156 Tex. Cr. R. 197, 240 S. W. 2d 293*, to the effect that a failure to carry an accused before a magistrate vitiates a confession only when there is some causal connection between the failure to carry him before a magistrate and the making of the confession. We are unable to find from this record sufficient evidence to call for an application of the rule stated.

Accordingly, the facts before us do not warrant the conclusion that the confessions of appellant resulted from the failure of the arresting officer to carry him before a magistrate.

We remain convinced that reversible error is not reflected.

Appellant's motion for rehearing is overruled.

Davidson, Judge

(Delivered June 1, 1955)

APPENDIX E

Court of Criminal Appeals
State of Texas
Austin

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that in Cause No. 27,390, styled Tommy Lee Walker v. State of Texas, the judgment of the trial court was affirmed February 9, 1955; that appellant's motion for rehearing was overruled June 1, 1955, and that appellant's second motion for rehearing was overruled without a written opinion on June 22, 1955; that the judgment in this case became final with the overruling of appellant's second motion for rehearing on June 22, 1955, and that mandate would have issued had appellant not filed a motion to stay issuance of mandate so that he might apply to the Supreme Court of the United States for a writ of certiorari.

I further certify that the judgment in said case is final on the docket of this court.

Witness my hand and the seal of the Court at Austin, Travis County, Texas, this 23rd day of August, 1955.

Glenn Haynes, Clerk
Court of Criminal Appeals of Texas.

APPENDIX F

Tommy Lee Walker, Appellant,
No. 27,390. v. Appeal from Dallas County
The State of Texas, Appellee.

ORDER STAYING ISSUANCE OF MANDATE

The application of the appellant for a stay of the issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the appellant for a period of ninety days from this date in order that he may apply to the Supreme Court of the United States for a writ of certiorari.

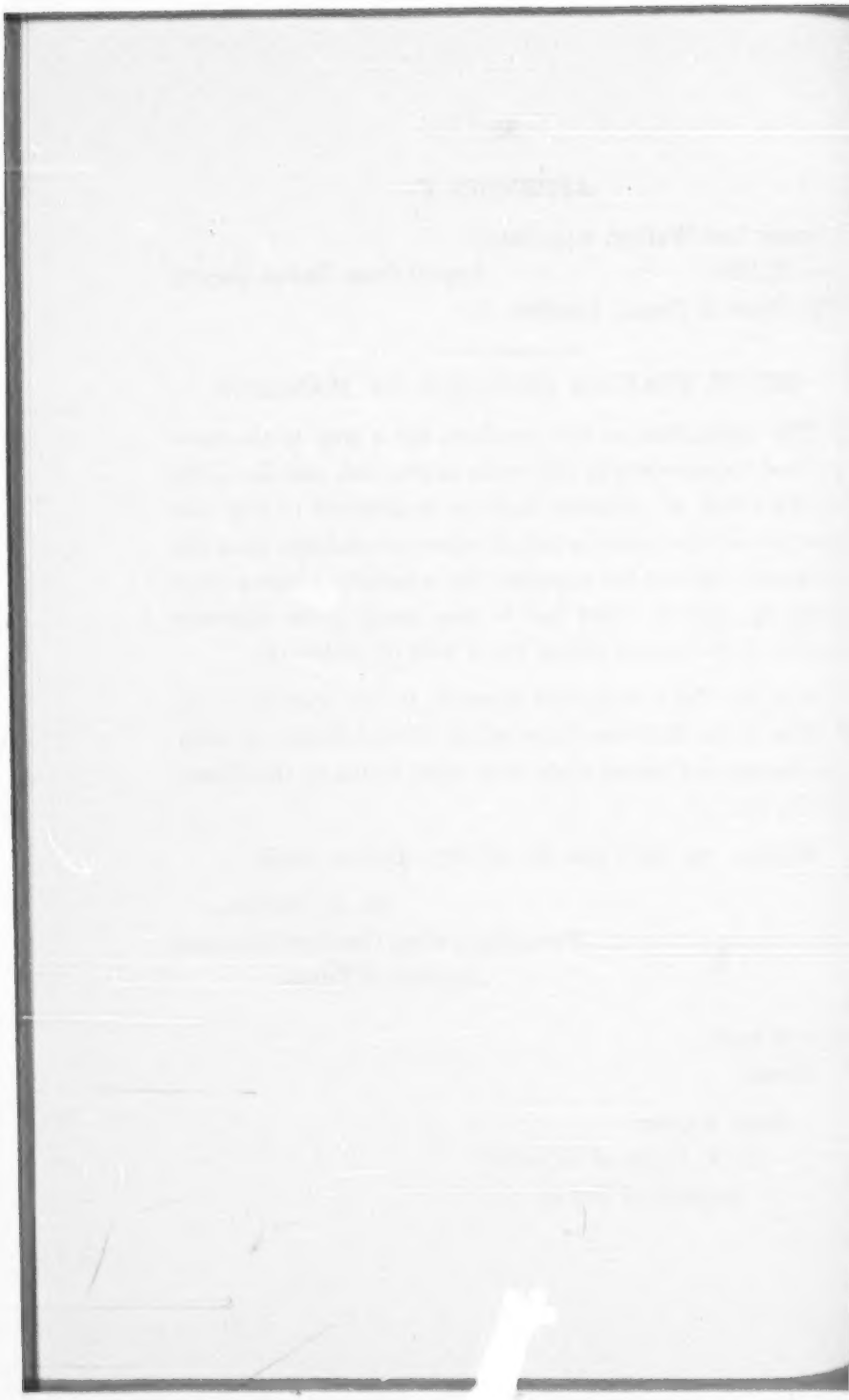
And the Clerk is further directed, in the event the writ is filed in the Supreme Court of the United States, to delay the issuance of the mandate until final action by that Court in the matter.

Witness my hand this the 25 day of June, 1955.

W. A. Morrison
Presiding Judge, Court of Criminal
Appeals of Texas.

A true copy.
Attest:

Glenn Haynes
Clerk, Court of Criminal
Appeals of Texas.



APPENDIX G

CRIMINAL DISTRICT COURT NO. 1
January Term A. D., 1954

No. 5213-HI

THE STATE OF TEXAS
v.
TOMMY LEE WALKER

MURDER WITH MALICE March 29, 1954

This day this cause was called for trial, and the State appeared by her criminal district attorney, and the defendant, Tommy Lee Walker appeared in person, his counsel also being present ,and both parties announced ready for trial, and the said defendant in open Court pleaded "Not Guilty" to the charge contained in the indictment herein; thereupon a jury, to wit: W. E. Cole and eleven others, was duly selected, empaneled and sworn, who having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of the verdict, and afterwards were brought into open court, by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the fol-

lowing verdict, which was received by the Court, and is here now entered upon the minutes of the court, to wit:

We, the jury find the defendant guilty of murder with malice, as charged in the indictment, and assess his punishment at death.

/s/ W. E. Cole
Foreman

It is therefore considered and adjudged by the court that the said defendant is guilty of murder with malice as found by the jury, and that he be punished, as has been determined by the jury by death and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant is remanded to the Sheriff of Dallas County, Texas, to await the further order of the court herein.

Office - Supreme Court, U.S.
FILED
DEC 5 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 374

TOMMY LEE WALKER,
Petitioner,

v.

STATE OF TEXAS,
Respondent,

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
Attorney General of Texas
WILL D. DAVIS
Assistant Attorney General
Capitol Station
Austin, Texas
Attorneys for Respondent

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	4
Questions Presented	4
I.	4
II.	4
III.	5
Statement of Facts Material to a Consideration of the Federal Questions Presented	5
Facts Under Questions I and II	5
Facts Under Question III	11
Respondent's Counterpoints	13
Respondent's Counterpoints 1 and 2 (Restated)	13
Argument and Authorities	13
Respondent's Counterpoint 3 (Restated)	25
Argument and Authorities	25
Conclusion	31

INDEX OF AUTHORITIES

Cases:	Page
Allen v. Alleghany Co., 196 U.S. 58, 49 L.Ed. 551	29
Atkins v. Texas, 325 U.S. 395 (1945)	14
Avery v. Popper, 179 U.S. 305, 45 L.Ed. 203	29
Cassell v. Texas, 339 U.S. 282 (1950)	14, 17
Congdon v. Goodman, 2 Black (67 U.S.) 574, 17 L.Ed. 257	28
De Sasussure v. Gallia[illegible]27 U.S. 216, 32 L.Ed. 125	29
Elder v. Badgley, 204 U.S. 85, 51 L.Ed. 318	29
Ex rel Hurtiz v. North, 271 U.S. 40, 70 L.Ed. 818, 46 S.Ct. 384	28
Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141	3, 27, 31
Gasway v. State, 248 S.W.2d 942 (cert. den. 344 U.S. 874, 97 L.Ed. 677)	4, 29
Goleman v. State, 247 S.W.2d 119 (cert. den. 344 U.S. 847, 73 S.Ct. 66, rehearing den. 344 U.S. 882, 73 S.Ct. 174)	4, 29
Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159	22

INDEX OF AUTHORITIES

(Continued)

Cases:	Page
Holmes v. Jennison, 114 Pet. (39 U.S.) 540, 10 L.Ed. 579	28
John v. Paullin, 231 U.S. 583, 58 L.Ed. 381	29
Lem Woon v. Oregon, 299 U.S. 586, 57 L.Ed. 1340	29
Lisenba v. California, 314 U.S. 219 (1942)	16
Lyons v. Oklahoma, 322 U.S. 596	27
McBride v. Hoye, 11 Pet. (36 U.S.) 167, 9 L.Ed. 673	28
McMurrin v. State, 239 S.W.2d 632 (cert. den. 72 S.Ct. 115, 342 U.S. 874)	16
McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819	3, 12, 26, 27
Martin v. Texas, 200 U.S. 316	20
Minn. St. P. and S.S.M.R. Co. v. C. L. Merrick Co., 254 U.S. 376, 67 L.Ed. 312	29
Morris v. State, 251 S.W.2d 731, (cert. den. 345 U.S. 951, 73 S.Ct. 863)	2, 16
Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579	22
Palmer v. Marston, 14 Wall (81 U.S.) 10, 20 L.Ed. 826	28

INDEX OF AUTHORITIES

(Continued)

Cases:	Page
Paris v. State, 249 S.W.2d 217 (cert. den. 344 U.S. 857, 73 S.Ct. 92, rehearing den. 344 U.S. 888, 73 S.Ct. 183	4, 29
Pierre v. Louisiana, 306 U.S. 354	22
Quinby v. Boyd, 128 U.S. 488, 32 L.Ed. 502	29
Sevier v. Haskell, 14 Wall (81 U.S.) 12, 20 L.Ed. 827	29
Smalley v. Loudennor, 196 U.S. 93, 49 L.Ed. 400	29
Snowden v. Hughes, 321 U.S. 1	22, 24
Stein v. New York, 348 U.S. 156, 73 S.Ct. 1077	28, 31
Stroble v. California, 343 U.S. 181, 72 S.Ct. 599	28, 31
Sylvester v. Washington, 215 U.S. 80, 54 L.Ed. 101	29
Statutes:	
United States Code, Title 18, Section 243	17
Texas Code of Criminal Procedure	
Articles 333-339	13
Article 338	14
Article 727a	3, 13, 25, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 374

TOMMY LEE WALKER,
Petitioner,

v.

STATE OF TEXAS,
Respondent,

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes Respondent, The State of Texas, and files this its brief in opposition to the petition for writ of certiorari.

Opinions Below

The opinions of the Court of Criminal Appeals of Texas have not yet been reported. However, the Petitioner, in his Petition for Writ of Certiorari filed herein, has set out the opinions of the Court of Criminal Appeals in his Appendices "C" and "D", and these are satisfactory to Respondent.

The opinions of the Court of Criminal Appeals, insofar as they are pertinent to the Writ of Certiorari, held:

(a) That the indictment against Petitioner should not be quashed on the claimed ground that there was racial discrimination by the District Judge in the selection of the Grand Jury Commissioners who, in turn, selected the Panel from which the Grand Jury was selected that returned the indictment against Petitioner, there being absolutely no evidence of discrimination. The opinion of the Court of Criminal Appeals stated that the proof in this case was very similar to that in *Morris v. State*, 251 S.W.2d 731, in which certiorari was denied by the Supreme Court of the United States, 345 U.S. 951, 73 S.Ct. 863.

(b) The opinion held that the indictment should not be quashed on the asserted ground that racial discrimination had been practiced in the formation of the Grand Jury which indicted Petitioner, because there was absolutely no evidence of express, intentional, or unintentional discrimination or exclusion in the selection of the Grand Jury which indicted Petitioner; that, in fact, a Negro was on the Grand Jury which returned the indictment, and that

Negroes had been on each of the Grand Juries impaneled in Dallas County for the past 10 years, except three.

(c) The opinion further held that there was no error in the admission into evidence of the two confessions made by Petitioner. Petitioner objected to these confessions on the grounds that he was arrested without a warrant, held in custody from Friday evening, January 29, 1954, to Tuesday, February 2, 1954, without charges being filed against him, and without being taken before a magistrate by the police officers, and that during this time he made the two confessions which were admitted into evidence against him. The objection made by the Petitioner to the admission of these confessions was on the asserted grounds that they were inadmissible because Article 727a, Vernon's Annotated Texas Code of Criminal Procedure, forbids introduction of any evidence obtained in violation of the Constitution and laws of the United States or of Texas, and that the rule in *McNabb v. United States*, 63 S.Ct. 608, 318 U.S. 332, applied. The Court of Crinimal Appeals applied the rule as announced by this Court and recognized that the rule announced in *McNabb v. United States, supra*, does not apply to evidence and procedure in state courts, and ruled that failure to take an accused before a magistrate did not, of itself, standing alone, vitiate a confession or violate the state statute. *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141. In support of its holding on this point the Court cited, among others, cases involving the same contention which had been before it and which

contention had been by the Court of Criminal Appeals overruled, and in which cases the Supreme Court of the United States had denied certiorari, such cases being: *Goleman v. State*, 371 S.W.2d 119, cert. den. 344 U.S. 847, 73 S.Ct. 66, rehearing den. 344 U.S. 882, 73 S.Ct. 174; *Gasway v. State*, 248 S.W.2d 942, cert. den. 344 U.S. 874, 73 S.Ct. 167; *Paris v. State*, 249 S.W.2d 217, cert. den. 344 U.S. 857, 73 S.Ct. 92, rehearing den. 344 U.S. 888, 73 S.Ct. 183.

Jurisdiction

Respondent raises no question as to the jurisdiction of the Supreme Court of the United States in this case, because federal questions were raised in the State courts, and are asserted here.

Questions Presented

I.

Whether racial discrimination was exercised by the Criminal District Judge of Dallas County in appointing the Grand Jury Commissioners who, in turn, selected the Grand Jury Panel from which the Grand Jury was selected that returned the indictment against the Petitioner.

II.

Whether racial discrimination was exercised by the Grand Jury Commissioners in selecting the Grand Jury Panel from which the Grand Jury was selected that returned the indictment against the Petitioner.

III.

Whether the admission into evidence of Petitioner's two confessions was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of Facts Material To A Consideration Of The Federal Questions Presented

Facts Under Questions I and II

Petitioner, Tommy Lee Walker, a Negro, was picked up by the Dallas police for investigation and questioning concerning the rape, robbery, and murder of a Dallas woman. He was subsequently indicted, tried, and convicted of murder in Criminal District Court No. 2 for Dallas County, and was sentenced to death upon the recommendation of the Petit Jury.

Petitioner filed a motion to quash the indictment on the ground that he was denied the equal protection of law and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. As grounds for these contentions, Petitioner alleged in his motion that the District Judge who selected the Grand Jury Commission discriminated against the Negro race, and purposely and intentionally excluded Negroes from the Grand Jury Commission; that no Negro served on the Grand Jury Commission which selected the members of the Grand Jury which indicted Petitioner; that the Grand Jury Commissioners had intentionally and purposely excluded Negroes from the Grand

Jury Panel from which the Grand Jury was selected that indicted the Petitioner, and thereby discriminated against the Negro race. (Tr. 10-18). Considerable testimony was offered by Petitioner in support of his motion to quash in an attempt to establish the number of Negroes in Dallas County eligible for service on Grand Jury Commissions and Grand Jury Panels. (S.F. 5-104).

Judge Henry King of the Criminal District Court, No. 2, Dallas County, was called as a witness and testified: That he had been Judge of that Court for 18 years; that he and the other District Judge alternately selected the Grand Jury Commissioners and impaneled Grand Juries; that he feels responsible to the people to appoint a Commissioner who is good in every respect; that he has never picked a Commissioner that he didn't know personally, knew his background, and that was a person for whom he could personally vouch; that he always selected men the community would recognize and have confidence in so that there would be no question of fraud or of any character of discrimination in the selection of the Grand Jury; that in the selection of Grand Jury Commissioners he never discriminated against any particular individual because of race, color or creed; that he always qualifies the Commissioners by the statute; that he always instructs the Commissioners that they should not discriminate against any person because of race, creed or color in their selection of the Grand Jury Panel; that he never instructed any member of the Grand Jury Commission to limit the number of Grand Jurors of any one race to any

specific number; that since 1942, to his recollection, there had been but one Grand Jury Panel that did not have at least one colored person on it; that he remembered one instance in which the Grand Jury Panel had three Negroes on it; that with the exception of some Negro lawyers, he knew no Negroes intimately enough to know their backgrounds and who he could vouch for so that he might put them on the Commission. (S.F. pp. 114-126).

Judge Harold B. Wright of the Criminal District Court of Dallas County, testified: that he had been Judge of that Court since February of 1953; that he selected the Grand Jury Commissioners for the January Term, 1954 (these Commissioners selected the Grand Jury Panel which indicted Petitioner); that in selecting Commissioners he has never discriminated against any person because of race, color, or creed; that in selecting Commissioners he selected men he knew and who were qualified according to the statute; that he instructed the Grand Jury Commissioners that in selecting Grand Jurors they should not discriminate against any person because of race, color, or creed; that there have always been members of the Negro race on the Grand Jury Panels and on the Grand Juries since he has been on the bench; that there was a Negro on the Grand Jury for the January Term of 1954 (which indicted Petitioner); that of the Grand Jury Commissioners he has appointed, all were white citizens; that with the exception of the Negro attorneys he knew, he knew few Negroes, and none that he thought possessed the qualifications of a Grand Jury Commis-

sioner under the statute; that his appointment of Grand Jury Commissioners was based upon his personal knowledge and acquaintance with his selections, and his belief in their ability, integrity, and honesty to carry out their duties; that he has never taken into consideration a person's race, color, or religion. (S.F. 126-134).

Robert A. Hall was called as a witness and testified: that he was Judge of the Criminal District Court of Dallas County from July 1, 1947, until February 1, 1953; that in selecting Grand Jury Commissioners he attempted to get men from different parts of Dallas County who he felt would select the best men possible to serve on the Grand Jury Panel; that he always picked men he knew personally and intimately, thereby knowing their habits and characters; that he always gave the Jury Commissioners the statutory instructions, and instructed them that in selecting Grand Jurors they must not discriminate against anyone because of race, color, or creed; that during his term of office he did not remember any Grand Jury Panel that did not have a colored person on it; that he remembered one occasion on which there were three Negroes on the Grand Jury Panel, and another occasion on which there were two Negroes on the Panel; that in selecting Grand Jury Commissioners he at no time had any intention of discriminating against any one because of race or color; that his acquaintanceship with the Negroes he knew was not intimate enough for him to know whether, as Grand Jury Commissioners, they would select the proper knid and char-

acter of Grand Jurors; that he never instructed the Grand Jury Commissioners to select a particular number of any race. (S.F. 104-113).

Charles T. Hansen testified: that he served on the Grand Jury Commission which selected the Grand Jury that was impaneled for the January Term, 1954 (which indicted Petitioner); that of the 16 men selected for the Jury Panel, one was a Negro; that the Commissioners did not discuss the matter of putting Negroes on the Grand Jury; that the District Judge had instructed the Commissioners that they were not to discriminate against any person because of race, creed or color; that he knew Clarence Jackson personally, knew he was a Deacon of a Church, and was a fair gentleman and would give an impartial and fair judgment, and that he recommended that Clarence Jackson be selected to serve on the Grand Jury Panel; that he informed the other two Commissioners that Jackson was a Negro; that he did not know that all the other members of the Grand Jury who were selected were white citizens until some time later; that he made his selections to serve on the Grand Jury Panel from his friends, acquaintances, business associates, and members of his Lodge, that he did not know the color of the men suggested by the other two Commissioners, and that if he had it would not have made any difference so far as putting them on the Grand Jury. (S.F. 70-80).

Mr. M. G. Spencer testified: that he was a member of the Commision that selected the Grand Jury Panel for the January Term, 1954 (which indicted

Petitioner); that one member of the Grand Jury Panel selected was a Negro; that the entire Grand Jury Panel (16 names) was returned to the District Judge; that he understood during the Commission's deliberations that Clarence Jackson was a Negro because C. T. Hansen told him; that at the time of deliberations he did not know whether some of the other members of the Jury Panel were Negroes; that each of the selections for the Grand Jury Panel were discussed as to their qualifications for job; that Clarence Jackson was the only member of the Panel whose racial identity was mentioned; that the District Judge had instructed the Commissioners as to the statutory qualifications of Grand Jurors and had instructed them not to discriminate against any person because of race, creed, or color; that he made his selections for the Grand Jury Panel from his acquaintances, business and social, or otherwise, and were people he knew something about; that in selecting the names on the Grand Jury Panel he did not have any intention of discriminating against anyone because of race or color; that if one of the other Commissioners had suggested a member of the Negro race who was qualified to serve on the Grand Jury, he would have had no intention of discriminating against that person; that some of the Commissioners could have put Negroes' names down so far as he knew, for there were some that he did not know, and their racial identities were not discussed; that he attempted to select men to serve on the Jury Panel who could financially afford to take three months time away from their businesses. (S.F. 81-89).

Further evidence was presented that for a period of ten years before the Petitioner was indicted, some 40 separate Grand Jury Panels had been selected, and a separate Grand Jury had been selected from each of these Panels. During that period of time there had always been Negroes on these Panels, and for the 10 years immediately before the Petitioner was indicted, Negroes had served on the vast majority of the 40 Dallas County Grand Juries impaneled during that time. There had been only three Grand Juries out of the 40 impaneled which did not have a Negro member, while some of these Grand Juries had more than one Negro member.

The motion to quash was overruled by the trial court and sustained by the Court of Criminal Appeals, which found that there was no evidence of systematic exclusion of Negroes from the Grand Jury Commission or from the Grand Jury Panel, and that, in fact, the District Judges and Grand Jury Commissioners had conscientiously attempted to select men of high character and ability to serve on the Grand Jury, without regard to race, color, or creed.

Facts Under Question III

The Petitioner was taken into custody by the Dallas police on Friday evening, January 29, 1954. He was taken before a magistrate and charged formally on Tuesday, February 2, 1954. On Saturday, January 30, 1954, he made a statement to Captain J. W. Fritz of the Dallas police, and confessed the murder of a Dallas woman. On February 6, 1954,

after he had been formally charged, Petitioner made another statement confessing the crime to Mr. Millard Sweatt, a special investigator for the Dallas County District Attorney's office, in the presence of Mr. Henry Wade, District Attorney of Dallas County, Mr. Jim Allen, Assistant District Attorney, Mr. Roy Johnson of the Dallas Morning News, and Mr. Russ Thornton, of WBAP Television Station. (S.F. 595). This confession was in almost identical terms with the original statement given to Captain Fritz on January 30. Both Captain Fritz and Mr. Sweatt gave Petitioner the statutory warning before he made his confession. (S.F. 199, 594). By his own testimony Petitioner admitted that at no time while he was in the custody of the police did he suffer any brutality, coercion, mistreatment, physical violence, or even threats of physical violence. (S.F. 532, 550, 567, 568, 598, 599). Neither was any sort of promise of leniency ever offered Petitioner if he would cooperate with the police officials and make the statement. (S.F. 568, 598, 599).

Petitioner objected to admission into evidence of the confessions solely upon the grounds that he had not been taken immediately before a magistrate and charged with a crime, thereby making the confessions involuntary and inadmissible. The trial court submitted the question of voluntariness to the Jury, which found that they were the voluntary confessions of the Petitioner.

In the Court of Criminal Appeals of Texas, Petioner advanced the rule in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, to support his contention, which was overruled by that Court.

Respondent's Counterpoints

1. There was no showing by Petitioner of clear and intentional discrimination in the appointment of Grand Jury Commissioners.
2. There was no showing by Petitioner of clear and intentional discrimination in the selection of the Grand Jury Panel which indicted him.
3. Petitioner's confessions were not taken in violation of the Fourteenth Amendment to the Constitution of the United States, and the Court of Criminal Appeals of Texas correctly held that the admission of the confessions did not violate the Texas statute, Article 727a, Texas Code of Criminal Procedure.

Respondents Counterpoints 1 and 2
(Restated)

1. There was no showing by Petitioner of clear and intentional discrimination in the appointment of Grand Jury Commissioners.
2. There was no showing by Petitioner of clear and intentional discrimination in the selection of the Grand Jury Panel which indicted him.

Argument and Authorities

Appointment of Grand Jury Commissioners in Texas for the purpose of selecting members of the Grand Jury Panel is provided for by statute. (Arts. 333-339, Tex. Code Crim. Pro.) No complaint is made by the Petitioner as to the invalidity of any of these statutes or portions thereof, nor to the

fairness of the statutory system. In fact, this method of selection has been recently reviewed by this Court and its validity accepted. *Atkins v. Texas*, 325 U.S. 395 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950). The entire objection entered by Petitioner is that there were no Negroes on the Grand Jury Commission which selected the members of the Grand Jury Panel which indicted him, and that the Grand Jury Commissioners, in making their selections for the Grand Jury Panel, intentionally, purposely, and systematically discriminated against Negroes on the Grand Jury Panel.

The fact that there were no Negroes on the particular Grand Jury Commission which selected the Grand Jury which indicted Petitioner is of no consequence, as a mixed Jury Commission in each instance certainly is not required by the equal protection clause of the Fourteenth Amendment if, in fact, that clause is even concerned with the composition of the Grand Jury Commission as such. The Grand Jury Commission plays but a secondary or ancillary role in the administration of criminal justice. It is but a means to an end as its sole purpose is to select 16 men from the citizens of the different portions of the county to be summoned as Grand Jurors for the next term of court, or the term of court for which said Commissioners were selected to serve as directed in the order of the court selecting the Commissioners. (Art. 338, Texas Code of Criminal Procedure).

Injury to the rights of Petitioner as guaranteed by the Federal Constitution can come only from the

Grand Jury which returns the indictment, or the Petit Jury which returns the verdict. Under no conceivable situation could his rights be injured in the selection of the Grand Jury Commission so long as the Grand Jury Commissioners select qualified, fair, and competent Grand Jurors without discrimination because of race, creed, or color, or for any other reason.

The Grand Jury Commissioners are unlike Grand Jurors. Grand Jurors hear the evidence and return the indictment. They play an active role in the ultimate results. An indictment and conviction are both essential elements in the determination of the rights of an accused. The same cannot be said of the Grand Jury Commission which merely choses the Grand Jury, which then launches the legal machinery affecting the rights of an accused.

Many cases have been decided by this Court relative to discrimination against Negroes in the selection of Juries, both Grand and Petit. Several of the leading cases have come from the State of Texas. It is not deemed necessary to review these holdings in any detail in this brief due to the Court's familiarity with them, and for the reason that they are not conclusive on the issues involved here. These cases have gone to great lengths to protect members of the Negro race from discrimination. Briefly stated, the earlier cases dealt with discriminatory practices against Negroes in the selection of both Grand and Petit Juries, while the more recent ones prohibit discrimination in the selection of Grand Juries, only.

This Court has never decided whether the failure to have Negroes on the Jury Commission is such a discrimination as to constitute a denial of an accused Negro's constitutional rights in violation of the equal protection clause of the Fourteenth Amendment. However, this Court has refused applications for the Writ of Certiorari where this precise question has been raised. *McMurrin v. State*, 239 S.W.2d 632, cert. den. 72 S.Ct. 115, 342 U.S. 874; *Morris v. State*, 251 S.W.2d 731, cert. den. 73 S.Ct. 863, 345 U.S. 951.

Petitioner's first proposition rests upon the position that alleged discrimination in the selection of the Jury Commission constitutes a denial of constitutional rights. He relies primarily for proof of discrimination in this case upon the failure of the District Judges of Dallas County, over a period of years, to appoint members of the Negro race to serve as Grand Jury Commissioners.

The Fourteenth Amendment to the Constitution of the United States guarantees that no person shall be deprived of his life, liberty or property without due process of law, and that no person shall be denied the equal protection of the laws. General speaking, this constitutional provision, as applied to a criminal case, guarantees that a person shall receive a fair and impartial trial. *Lisenba v. California*, 314 U.S. 219 (1941). In order for Petitioner's contention to be upheld, it must be established that the failure of the District Judge to appoint members of the Negro race on the Jury Commission prevented him from receiving a fair and impartial trial, and that the Judge

did so with the intention of discriminating against the Negro race.

The Grand Jury Commission was appointed merely as a judicial administrative body. The Jury Commissioners merely perform the ministerial function of selecting a list of sixteen persons who possess the necessary statutory qualifications to be summoned as Grand Jurors. From this number, twelve are subsequently selected by the Court and impaneled as a Grand Jury. It is true that the Commissioners cannot discriminate against members of the Negro race in selecting the persons to serve on the Grand Jury; but, if they do not practice any discrimination in performing their duties, it is difficult to understand how the fact that the Commissioners are all white men will result in a denial of any constitutional rights of the accused.

Petitioner's contention is that the District Judge discriminated against Negroes in failing to select a Negro as a Commissioner when he selected men known to him personally to be men of high character and ability. The Dallas County District Judges have not disregarded any of the decisions of this Court, nor have they violated the provisions of United States Code, Title 18, Section 243, which would have been a denial of a proper trial to a Negro defendant in a criminal case. *Cassell v. Texas*, 339 U.S. 282 (1950). Petitioner is seeking, nevertheless, to have the Court extend its former holdings against discrimination so as to include a situation which is entirely unrelated to a Negro's receiving a fair and impartial trial.

The judges, in the performance of their statutory duty of selecting the Jury Commissioners, are not passing upon the guilt of an accused nor would their action, even if discriminatory, constitute a denial of due process or equal protection of the laws. They are merely exercising a discretionary duty imposed on them by statute—a duty which in no way affects the outcome of a criminal trial.

It is submitted that to hold that an absence of Negroes as Jury Commissioners violated the equal protection due Petitioner would be to disregard the proper function of the Commissioners, unrelated as it is to the fair and impartial trial received by Petitioner in this case. Such holding would also cast unwarranted and wholly unjustified reflections upon the manner in which the District Judges of Dallas County have discharged their duties in the selection of Jury Commissioners.

The evidence presented before the Court on Petitioner's motion to quash, revealed that no "clear and intentional discrimination" against Negroes in the selection of Grand Jury Commissioners is being practiced in Dallas County, Texas. Judge Harold B. Wright testified that in selecting Commissioners he had never discriminated against any person because of race, color, or creed, and that he selected men known to him to be qualified and capable; that his appointment of Commissioners was based upon his personal knowledge and acquaintances, and his belief in the integrity and honesty of those men whom he appointed, with no consideration as to their color; that he always instructed the Commissioners that in

their selection of the Grand Jury Panel they must not discriminate between race, religion, creed, or color. Absolutely no evidence was offered by Petitioner showing discrimination.

Judge Henry King stated that he picked as Commissioners only those men known to him personally, whose backgrounds he knew, and for whom he could personally vouch; that he never discriminated in his appointments between any race, creed, or color, and that he always instructed the Commissioners that they should not so discriminate in selecting the Grand Jurors.

Former Judge Robert A. Hall also testified that he appointed men as Grand Jury Commissioners whom he personally knew and for whom he could vouch, and that he in no manner ever discriminated against anyone because of color.

Each of these men testified that they had not appointed Negroes to the Grand Jury Commission because of the fact that they personally did not know any Negro for whom they could vouch as to his qualifications to serve as a Grand Jury Commissioner, therefore none had been appointed to the Commission.

Here we have sincere, honest, conscientious men on the bench attempting to comply with the statutory requirements and the requirements of their conscience and their duty to their community, and appoint without discrimination Grand Jury Commissioners known to them personally to be men of outstanding character and ability. But Petitioner would have this Court require that these Judges

discriminate in their appointments, breach their public trust, and place men on the Grand Jury Commission whom they do not know and cannot vouch for merely because they are of another color. The Fourteenth Amendment to the Constitution of the United States does not require juries to be composed of mixed races, nor of a proportionate number of each race, nor of all one race. *Martin v. Texas*, 200 U.S. 316. Quite the contrary, the requirement is that there be *no discrimination*, one way or the other, because of race, creed, or color, in the selection of juries, regardless of who is being tried, white or Negro. Any other degree of the rule—that is, requiring equal, mixed, or proportionate representation on the Jury—would be discrimination in itself.

If Petitioner's contention is to be carried to its ultimate conclusion, then *legal* discrimination, though not *actual* discrimination, would result in the criminal trials of all Negroes in Texas. Grand Jury Commissioners are appointed by District Judges. All District Judges in Texas are members of the white race. If the test as to discrimination can be made one step removed from the Grand Jury—in the Grand Jury Commission—it can be made two steps removed therefrom. This would mean that the rights of a Negro on trial are infringed because the District Judge who appoints the Grand Jury Commission which selects the Grand Jury is, without exception, a member of the white race, to the exclusion of Negroes. In the event a District Judge resigns or a vacancy occurs the vacancy is filled by appoint-

ment by the Governor who, without exception, has always been a member of the white race. Thus, three steps removed would be the charge of discrimination because the Governor who appointed the District Judge who appointed the Grand Jury Commissioners, who selected the Grand Jurors, was not a Negro. Further, to follow Petitioner's position to a logical end, it would lead to the conclusion that no matter how atrocious a crime one might commit, he could not be punished if, though without discrimination, there was no member of his race on the Trial Jury which tried him; or, if there was a member or members of his race on the Trial Jury, he could not be legally convicted if there was no member of his race on the Grand Jury which indicted him; or, if there were members of his race on the Grand Jury which indicted him and the Petit Jury which tried him, he could not be legally convicted if there was no member of his race on the Grand Jury Commission which selected the Grand Jury Panel from which his Grand Jury was selected; and further, he could not then be tried for his violation of the law unless the Judge who appointed the Grand Jury Commission was a member of his race; and further, if the decision of the Trial Court was against him, the Court of Criminal Appeals of Texas could not pass on his appeal because no Judge of that Court was a member of his race, and neither could he have recourse to the Supreme Court of the United States for the same reason.

Such course of reasoning is absurd, *ad infinitum*, but such is Petitioner's position if logically carried to its inevitable conclusion.

The ultimate test must lie in the Grand Jury and the Petit Jury, for all the other groups or individuals are but ancillary entities who cannot affect, for better or worse, the rights of an accused so long as the Grand Jury which indicts him and the Petit Jury which tries him are selected without discrimination as to race, color, creed, or for any other reason. It is beyond comprehension how the appointment of Grand Jury Commissioners can possibly affect the guilt or innocence of an accused.

This Court has held that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires that there be no intentional or systematic exclusion of Negroes from Grand Jury service solely because of race and color. *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579; *Hill v. Texas*, 316 U.S. 400, 62 S.Ct. 1159; and other related cases. But a discriminatory purpose is not presumed. There must be a showing of "clear and intentional discrimination." *Snowden v. Hughes*, 321 U.S. 1; *Pierre v. Louisiana*, 306 U.S. 354.

In the instant case the Texas Court of Criminal Appeals found that there was no showing of express or intentional discrimination in the selection of the Grand Juries of Dallas County. Clarence Jackson, a Negro, was a member of the Grand Jury which returned the indictment against the Petitioner. It was shown that a Negro had been on each of the Grand Juries impaneled in Dallas County for the last ten years, except three, and that two Grand Juries had had two Negroes serving on them during this period.

There was no showing during this ten year period as to the racial composition of the Grand Jury Panels of sixteen names from which the Grand Juries of twelve were chosen, except that on one occasion three Negroes had been on the Panel.

Petitioner offered the testimony of two of the Jury Commissioners who selected the Grand Jury which returned the indictment against him. Commissioner Hansen testified that he recommended Clarence Jackson because he knew him personally; knew that he was a Deacon of the Church and a very worthy person, capable of giving an impartial and fair judgment; that he mentioned to his fellow Commissioners that Mr. Jackson was a member of the colored race; that he found out later that Jackson was the only member of the Negro race selected by him and his fellow Commissioners, but that he did not know the racial background of some of the other Grand Jurors at the time of their selection; and that the Commissioners did not discuss the matter of putting Negroes on the Grand Jury.

Commissioner Spencer testified that he understood during the Commission's deliberations that Jackson was a Negro because Commissioner Hansen had mentioned it to him; that at the time of the deliberations he did not know whether some of the other members of the Jury Panel were Negroes; that he made his selections for the Grand Jury Panel from his acquaintances, business and social, who were people he knew something about, and that in selecting the names for the Grand Jury Panel he did not have any intention of discriminating against anyone be-

cause of race or color; and that the Commissioners did not discuss one way or the other the matter of Negroes on the Grand Jury.

Judge King, Judge Wright, and former Judge Hall, each testified that they always instructed the Grand Jury Commissioners that they must not discriminate against any person because of race, creed, or color, or otherwise in their selection of members of the Grand Jury Panel, and they further testified that they never instructed anyone to limit the number of representatives from any race on the Grand Jury Panel.

Petitioner's contention that systematic discrimination has been exercised in the selection of the Grand Jury Panel in Dallas County is wholly unsupported by the facts in evidence. There is absolutely no indication from the evidence of a clear, intentional, systematic exclusion or limitation of any race on the Grand Juries. This Court will not presume that discrimination existed. *Snowden v. Hughes, supra.* There must be a showing of a clear and intentional discrimination, which is wholly lacking in this case. The fact remains that Negroes have served on Grand Juries and Grand Jury Panels without discrimination in Dallas County for the last ten years; that the Grand Jury Commissioners of Dallas County have selected good, fair, and competent Grand Jury Panels, composed of both Negro and white citizens, without regard to the Grand Jurors' race, creed, or color; and, while it is immaterial to the basic constitutional question, a Negro was serving on the Grand Jury which indicted Petitioner.

The Grand Jury Commissioners who selected the Grand Jury that indicted Petitioner were appointed by the District Judge without discrimination; the District Judge charged the Grand Jury Commissioners to select Grand Jurors without discrimination because of race or color; the Grand Jury Commissioners followed these instructions and selected Grand Jurors without discrimination because of race or color; and these Grand Jurors indicted Petitioner for the offense of murder, for which he was found guilty by a Petit Jury, the composition of which Petitioner does not complain about.

Clearly there has been no discrimination in violation of Petitioner's rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respondent's Counterpoint 3
(Restated)

3. Petitioner's confessions were not taken in violation of the Fourteenth Amendment to the Constitution of the United States, and the Court of Criminal Appeals of Texas correctly held that the admission of the confessions did not violate the Texas statute, Article 727a, Texas Code of Criminal Procedure.

Argument and Authorities

During the time that he was in the custody of the Dallas police Petitioner suffered no brutality, duress, physical violence, coercion, threats of any nature, nor

promises of leniency if he cooperated with the police and confessed to the murder. Nor was he subjected to any long and uninterrupted questioning. In fact, Petitioner does not even claim the existence of any of these facts which would vitiate the confessions. The uncontradicted testimony was to the effect that there had been no force or duress, or threats of force, or promises and that Petitioner had voluntarily given the confessions. The officers taking the confessions fully complied with the Texas statute requiring that a proper warning be given to Petitioner before he made his confessions. His sole complaint is that it was error to admit into evidence Petitioner's confessions because they were made while he was in custody of the police and before he had been taken before a magistrate, and to support this position Petitioner apparently relies heavily upon *McNabb v. United States*, 63 S.Ct. 608, 318 U.S. 332. However, Petitioner makes no claim of, nor can he show, the existence of any causal relationship between the making of the confessions and the failure to take him before a magistrate. Further, as shown by the record, Petitioner's second confession was given on February 6, after he had been formally charged on February 2, 1954.

The Texas Court of Criminal Appeals correctly stated the law when it held that:

> "It has been the consistent holding of this Court, and of the Supreme Court of the United States in passing on State court cases, that the rule in *McNabb v. U.S.* . . . does not apply and that the failure to take an accused forthwith

before a magistrate does not in itself standing alone vitiate a confession. *Dimery v. State*, 240 S.W.2d 293; *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 36; *Shook v. State*, 244 S.W.2d 220; *Leviness v. State*, 247 S.W.2d 115; *Goleman v. State*, 247 S.W.2d 119 (cert. den.); *Gasway v. State*, 248 S.W.2d 942 (cert. den.); *Paris v. State*, 249 S.W.2d 217 (cert. den.); *Hulen v. State*, 215 S.W.2d 211; *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 98 L.Ed. 872; *Stein v. New York*, 348 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522."

McNabb v. United States is a rule of evidence in the Federal Courts and is not a constitutional limitation imposed upon the States by the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Lyons v. Oklahoma*, 322 U.S. 596. Compliance with the *McNabb* rule is required in the Federal courts by the Supreme Court through its powers of supervision over procedure and prosecution in Federal courts in the trial of criminal cases. That power over State criminal trials is not vested in this Court. *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141. Therefore the doctrine of the *McNabb* case is not available to Petitioner as authority for his position. His trial was in a State court, not a Federal court. Rules of evidence of a State court are determined by the particular State's laws and the Fourteenth Amendment to the Constitution of the United States. This Honorable Court, in the *Gallegos* case, supra, held that the mere failure to take an accused before a magistrate immediately upon arrest does not in itself standing

alone vitiate a confession by violating the provisions of the due process clause of the Fourteenth Amendment. See also, *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599; *Stein v. New York*, 348 U.S. 156, 73 S.Ct. 1077. Petitioner has shown no casual relation between the failure to take him before a magistrate immediately and the confessions. Without such casual relationship, it cannot be said that the confessions were taken in violation of the Fourteenth Amendment.

Furthermore, it is respectfully submitted that Petitioner's position that the Court of Criminal Appeals of Texas erred in construing Article 727a of the Code of Criminal Procedure of Texas cannot here be considered by the United States Supreme Court for the reason that under the applicable authorities, the construction of a State statute by the court of last resort in that State is binding on the Supreme Court of the United States. *Ex rel Hurtiz v. North*, 271 U.S. 40, 70 L.Ed. 818, 46 S.Ct. 384. In *Holmes v. Jennison*, 114 Pet. (39 U.S.) 540, 10 L.Ed. 579, the Supreme Court of the United States held that the decisions of the highest court of a State must be received as conclusive evidence of the laws of such State on the laws involved. So far as the decision of the Court of Criminal Appeals as based on its construction of Article 727a, Code of Criminal Procedure of Texas, is involved in this petition, this Court has no jurisdiction to review that part of the decision based on State law. *McBride v. Hoye*, 11 Pet. (36 U.S.) 167, 9 L.Ed. 673; *Congdon v. Goodman*, 2 Black (67 U.S.) 574, 17 L.Ed. 257; *Palmer*

v. Marston, 14 Wall (81 U.S.) 10, 20 L.Ed. 826; *Sevier v. Haskell*, 14 Wall (81 U.S.) 12, 20 L.Ed. 827; *De Sasussure v. Gaillard*, 127 U.S. 216, 32 L.Ed. 125; *Quinby v. Boyd*, 128 U.S. 488, 32 L.Ed. 502; *Avery v. Popper*, 179 U.S. 305, 45 L.Ed. 203; *Smalley v. Loudennor*, 196 U.S. 93, 49 L.Ed. 400; *Allen v. Allegheny Co.*, 196 U.S. 58, 49 L.Ed. 551; *Elder v. Badgley*, 204 U.S. 85, 51 L.Ed. 318; *Sylvester v. Washington*, 215 U.S. 80, 54 L.Ed. 101; *Lem Woon v. Oregon*, 229 U.S. 586, 57 L.Ed. 1340; *John v. Paullin*, 231 U.S. 583, 58 L.Ed. 381.

Indeed, if the question of the proper construction by the Texas Court of Criminal Appeals of Article 727a was the only question raised in this petition, the Respondent would ask the Supreme Court to decline jurisdiction because the question has ceased to be substantial by reason of having been settled by previous decisions and involving no Federal question. *Paris v. State*, 249 S.W.2d 217 (cert. den. 344 U.S. 857, 97 L.Ed. 665); *Goleman v. State*, 247 S.W.2d 119 (cert. den. 344 U.S. 847, 97 L.Ed. 659); *Gasway v. State*, 248 S.W.2d 942 (cert. den. 344 U.S. 874, 97 L.Ed. 677.)

It has previously been held by the Supreme Court of the United States that a writ of error would be dismissed where the State court has followed a previous decision of the Federal Supreme Court in settling the question. *Minn. St. P. and S.S.M.R. Co. v. C. L. Merrick Co.*, 254 U.S. 376, 65 L.Ed. 312.

While the Texas Legislature may establish those rules of evidence it desires to be used in its state courts, the Texas Legislature cannot confer juris-

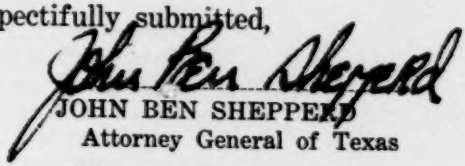
diction upon the Supreme Court of the United States. The Supreme Court must look to the Federal Constitution and the laws enacted by Congress for its jurisdiction. Therefore, while the Texas Legislature may say that evidence received in the State courts must not be in violation of the Constitution and laws of the United States, in reviewing matters of evidence introduced in the State courts and admitted by the State courts, the United States Supreme Court may look only to see whether the introduction of that evidence was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The court of last resort in the State itself is the final authority on all other matters of evidence introduced in the State courts. The final authority upon what evidence is competent evidence under a State statute, is the court of last resort in that State, unless the statute or the evidence is of such a nature as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the latter case the Supreme Court of the United States is the final authority as to the competency of the evidence. Therefore the Supreme Court of the United States must confine its review within the boundaries of the due process clause of the Fourteenth Amendment. Petitioner can show no casual relation between the failure to immediately carry him before a magistrate and the confessions, and thus, fails in his burden, for this Court under its prior decisions has held that the mere failure to take an accused immediately before a magistrate does not vitiate a confession.

Gallegos v. Nebraska, supra; *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599; *Stein v. New York*, 348 U.S. 156, 73 S.Ct. 1077.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas should be denied.

Respectfully submitted,



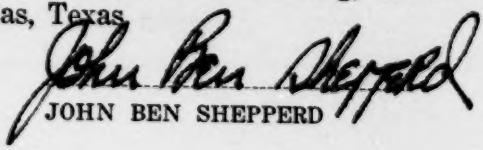
JOHN BEN SHEPPERD
Attorney General of Texas

WILL D. DAVIS
Assistant Attorney General

Capitol Station
Austin, Texas

Attorneys for Respondent

I, John Ben Shepperd, do hereby certify that copies of the foregoing Brief of the Respondent in Opposition to the Petition for Writ of Certiorari in the case of Tommy Lee Walker v. State of Texas, have been forwarded to Tommy Lee Walker in care of his attorneys of record, and to W. J. Durham and J. L. Turner, Jr., Excelsior Life Building, 2600 Flora Street, Dallas, Texas.



JOHN BEN SHEPPERD